87-37

Case No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

MARGUERITE EADES, Petitioner,

vs.

DONALD J. STERLINSKE, BRADLEY W. HUFF, and JULIE EWALD, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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April 29, 1987

QUESTIONS PRESENTED

1. Whether the preparation and filing of a fabricated record of a jury instruction conference never held in a criminal proceeding by a judge without notice to the criminal defendant are nonjudicial acts unprotected by judicial immunity?

2. Whether the spinning of a clerk's date stamp to fraudulently back date a fabricated record, alteration of the transcript and the clerk's docket sheet to conceal the entry of the fabricated record from the criminal defendant are nonjudicial acts unprotected by judicial immunity?

3. Whether the ministerial acts of a court reporter and court clerk not pursuant to any court order assisting a judge in the preparation, filing and concealment of a fabricated record of a

jury instruction conference never held are unprotected by judicial immunity?

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Case No.
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

MARGUERITE EADES, Petitioner,

vs.

DONALD J. STERLINSKE, BRADLEY W. HUFF, and JULIE EWALD, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Marguerite Eades, hereby prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this matter and in support thereof states the following:

DECISIONS BELOW

The opinions of the District Court appear in the Appendix at A7-A25. The opinion of the Court of Appeals, reported

at 810 F.2d 723 (7th Cir. 1987), appears in the Appendix at A2-A6.

STATEMENT OF JURISDICTION

Jurisdiction of the District Court is established by 28 U.S.C. § 1343 in that the present action was sought for violation of petitioner's constitutional rights pursuant to 42 U.S.C. § 1983. Jurisdiction of the Court of Appeals is established by 28 U.S.C. § 1291. The judgment of the Court of Appeals (No. 86-1884) was issued on January 30, 1987. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The present action arises from the deprivation of constitutional rights to liberty, effective assistance of counsel, and a fair trial in a criminal proceeding. The petitioner and plaintiff in the present case, Marguerite Eades,

was the defendant in the criminal proceeding and was imprisoned for nine months as a result of the unconstitutional acts of defendants. The respondents and defendants in the present case are the former judge[1], Donald Sterlinske, the judge's clerk, Julie Ewald, and the court reporter, Bradley Huff, for the criminal proceeding.

The unconstitutional actions by the respondents, a former judge, a clerk and a court reporter, were the fabrication of a portion of a criminal trial record and alteration of the transcript and record to conceal the fabrication from the petitioner.

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[1]Donald Sterlinske is not presently judge for Rusk County, Wisconsin, having resigned his position as judge in midst of proceedings before the Wisconsin (Footnote Continued)

Petitioner Eades was criminally charged with two counts of welfare fraud on June 16, 1980. The charges were brought in the Circuit Court for Rusk County, Wisconsin. In October, 1980, a jury trial was held on the two criminal charges. No jury instruction and verdict conference was held during the trial. Eades was convicted.

After the trial, petitioner changed attorneys. The new attorney representing petitioner Eades requested a trial transcript in order to file post-conviction motions. After the request for a transcript, Sterlinske called the court reporter, Huff, into his office and dictated a "certificate."

(Footnote Continued)
Judicial Commission which arose in part from the events of the present case.

This was done without notice to the petitioner or new counsel. The "certificate" provided in relevant part:

> I, D. J. Sterlinske, presiding Judge in the criminal matter of State of Wisconsin vs. Marguerite Eades, Case No. 80 CR 82, hereby certifies [sic] that upon the closing of the testimony and prior to the closing arguments of counsel a conference was held in chambers between the Court and counsel, and it was stipulated that there was no objection by counsel as to the verdicts submitted, and there was no objection as to the proposed instructions, and it was stipulated and agreed that the written jury instructions would not be given to the jury.

The "certificate" materially fabricated the record. The "certificate" represented that a complete instruction and verdict conference was held when no such conference had, in fact, been held. Sterlinske directed Huff to back date the "certificate" as of the date of the trial, although this is not the date it

was prepared and signed. Sterlinske also directed Huff to falsely alter the transcript to be consistent with the false certificate.

After January 29, 1981, Sterlinske caused Huff to rotate the date stamp on the Clerk of Court's filing stamp backwards to stamp the "certificate" as filed on October 23, 1980, the trial date. Sterlinske then caused the "certificate" to be placed in the court file, as if it had been filed on October 23, 1980, when it was actually prepared and filed several months later. At the same time, Sterlinske directed his clerk, respondent Ewald, to alter the docket sheet kept by the Clerk of Court to indicate the "certificate" had been filed on October 23, 1980.

These alterations of the criminal trial record were all conducted without

notice to petitioner Eades or her counsel. There was no order entered by Sterlinske requiring the alteration of the record. The respondents knew that the certificate was false and knew that its creation and insertion into the record was fraudulent and for the purpose of misleading Eades and her new counsel about the proceedings at trial.

Relying upon the altered record, Sterlinske attempted to dissuade the new counsel from making post-conviction motions. Sterlinske later relied on the fictitious instruction conference to deny post-conviction motions. Sterlinske then sentenced Eades to two years in prison. Eades served nine months in prison.

Petitioner Eades brought the present action against the respondents for their participation in a scheme which fabricated and falsely altered a criminal

trial record and transcript. The fabrication and alteration of the record without notice to petitioner Eades or her counsel was a deprivation of petitioner's constitutional rights to liberty, due process, and effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments.

The respondents moved to dismiss the action. The District Court, although finding the conduct "shocking" and "disgusting," granted the motions to dismiss holding that all respondents were entitled to absolute judicial immunity and entered judgment dismissing the action in its entirety. The Court of Appeals, although finding the conduct "reprehensible," affirmed the judgment of the District Court as to all respondents. Whereupon, the petitioner filed a Petition for Writ of Certiorari to the

United States Court of Appeals for the Seventh Circuit.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION.

There can be no dispute that the conduct in the present case is "reprehensible."[2] The conduct by respondents cannot be countenanced in any system of justice which guarantees due process. Chessman v. Teets, 350 U.S. 3, 4, 76 S. Ct. 34, 100 L. Ed. 2d (1955) (fraudulent alteration of transcript held to be a denial of due process). Despite the substantial constitutional abuses by

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[2]Although the activities of the respondents in the present case clearly constitute felonious conduct pursuant to Wis. Stat. sec. 946.72(1) (tampering with public records), for reasons known only to the Attorney General of the State of Wisconsin, the respondents have never been criminally prosecuted.

respondents and notwithstanding petitioner's imprisonment for nine months, respondents were held to be shielded by the judicial cloak of immunity. Therefore, petitioner is without any redress for the "reprehensible," "disgusting," and "shocking" abuse of her fundamental constitutional rights.

This Court should grant the Writ not merely to cure this incredible injustice, but also to define the appropriate limitations of the shield of immunity for acts which are conducted by one who wears a judicial cloak. Review is particularly warranted in the present case where the decision of the Court of Appeals essentially abrogates the second criteria established by Stump v. Sparkman, 435 U.S. 349, 361-62, 55 L. Ed. 2d 331,

98 S. Ct. 1099 (1978), the requirement that the conduct be a judicial act.

Related to the scope of the "judicial act" requirement is the question whether absolute judicial immunity extends to court administrative personnel, such as court reporters and clerks when performing ministerial duties not pursuant to any court order. There is no Supreme Court decision on whether and under what circumstances judicial immunity applies to court reporters and clerks.

The resolution of these issues by the Supreme Court at this time is necessary. Since the lower court's decision essentially merges the "judicial act" requirement into the requirement that the judge be acting in a proceeding within the scope of the judge's jurisdiction, it is contrary both to

Stump and to other decisions of courts of appeals relying upon the "judicial act" requirement. King v. Love, 766 F.2d 962, 968 (6th Cir.), cert. denied, ____ U.S. ____, 106 S. Ct. 351, 88 L. Ed. 2d 320 (1985) (misrepresentation about identity of person sought pursuant to a warrant); Brewer v. Blackwell, 692 F.2d 387, 396-97 (5th Cir. 1982) (pursuit and arrest); Gregory v. Thompson, 500 F.2d 59, 64 (9th Cir. 1974), (physical assault of a litigant) cited with approval in Stump, 435 U.S. at 361 n.10. See also Lopez v. Vanderwater, 620 F.2d 1229, 1235 (7th Cir.), cert. dismissed, 449 U.S. 1028 (1980) (judge acting as a prosecutor); Harris v. Harvey, 605 F.2d 330, 336 (7th Cir. 1979) (public statements by a judge).

The reasoning which essentially abrogated the "judicial act" requirement

also led the Court of Appeals to the erroneous conclusion that administrative personnel such as clerks and court reporters are entitled to absolute judicial immunity so long as the unconstitutional conduct breaching their ministerial duties involved discretion. This too, is contrary to other decisions by courts of appeals which have held clerks and court reporters are entitled only to qualified immunity. Holt v. Dunn, 741 F.2d 169, 170 (8th Cir. 1984); Green v. Maraio, 722 F.2d 1013, 1018-19 (2d Cir. 1983); Rheuark v. Shaw, 628 F.2d 297, 305 (5th Cir. 1980), cert. denied, 450 U.S. 931 (1981); Slavin v. Curry, 574 F.2d 1256, 1265-66 (5th Cir. 1978); McLallen v. Henderson, 492 F.2d 1298, 1299 (8th Cir. 1974). See also Lowe v. Letsinger, 772 F.2d 308, 312 (7th Cir. 1985).

A Supreme Court decision is necessary to clearly delineate the scope of the "judicial act" requirement and to clarify the application of both judicial immunity and the "judicial act" requirement to judges, clerks and court reporters. Therefore, in the interest of judicial economy and in clarification of the application and scope of the judicial immunity doctrine, as well as correcting an egregious injustice, this Court should grant certiorari to resolve these issues.

II. THE DECISION BY THE COURT OF APPEALS ESSENTIALLY ABROGATES THE JUDICIAL ACT REQUIREMENT CONTRARY TO PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS WHERE THE FABRICATION AND FRAUDULENT ALTERATION OF PART OF A CRIMINAL TRIAL RECORD WITHOUT NOTICE OR ORDER, INCLUDING THE ACT OF SPINNING A DATE STAMP BACKWARD TO FRAUDULENTLY BACK DATE A FABRICATED RECORD ARE NONJUDICIAL ACTS.

Judges for courts of general or superior jurisdiction enjoy absolute

immunity for judicial acts, unless committed "in the clear absence of all jurisdiction." Stump v. Sparkman, 435 U.S. 349, 355-57, 362, 55 L. Ed. 2d 331, 98 S. Ct. 1099 (1978); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 347, 351, 20 L. Ed. 646 (1872).

The purpose of absolute judicial immunity is to preserve the judiciary's independent decision-making process. Stump, 435 U.S. at 355-56; Pierson v. Ray, 386 U.S. 547, 554, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967); Bradley, 80 U.S. (13 Wall.) at 347.

For judicial immunity to apply, the actions must be both judicial acts and arguably within the court's jurisdiction. Stump, 435 U.S. at 355-57, 362; Bradley, 80 U.S. (13 Wall.) at 347, 351. The issue raised by the present petition is

the scope of the "judicial act" requirement.

The Supreme Court declared in Stump:

> The relevant cases demonstrate that the factors determining whether an act by a judge is a "judicial" one relate to the nature of the act itself, i.e., whether it is a function normally performed by a judge, and to the expectations of the parties, i.e, whether they dealt with the judge in his judicial capacity.

Stump, 435 U.S. at 362.

The Court of Appeals recognized that a separate "judicial act" requirement must be satisfied and ostensibly relied upon factors enunciated by this Court in Stump. (Ap. at A5.) A careful examination of the Court's reasoning, however, reveals that the Court actually merged the "judicial act" requirement with the jurisdiction requirement. The Court of Appeals concluded that since petitioner was a defendant in a pending

criminal matter, i.e., since the court had jurisdiction over the matter, the acts of the judge, clerk and court reporter fabricating the record, without notice and without any order, were judicial acts. This subsumes the "judicial act" requirement into the jurisdiction requirement and thus leads to the egregious error, as well as creating substantial confusion as to judicial immunity.

The critical language of the lower court's opinion is particularly revealing. After discussing the two factors necessary for an act to be judicial, normal performance by a judge and the relationship between the parties, the lower court reasoned:

> The answer to the first prong is already established. Judge Sterlinske presided over the plaintiff's criminal trial and post-trial proceedings and thus

> was performing the normal duties of a judge. Second, by virtue of her status as a defendant in criminal proceedings, Eades' relationship to the judicial system makes immunity appropriate in light of the concerns expressed in Bradley. Forrester v. White, 792 F.2d 647 (1986). The plaintiff was dealing with the judge in an official capacity since the acts involved post-trial proceedings.

(Ap. at A5; emphasis supplied.) This is the complete reasoning of the lower court that the acts were judicial.

The lower court concluded that where the circuit judge had jurisdiction, his actions fabricating the trial record, and concealing the alteration of the record from the petitioner and her attorney, all without any order were judicial acts. The decision inevitably leads to the conclusion that there really is no separate "judicial act" requirement.

Decisions in other circuits reveal a split of authority, including a split within the Seventh Circuit itself. These decisions also demonstrate the need for a viable, separate judicial act requirement, which allows relief in limited cases, while preserving the independence of the judiciary.

In Gregory, 500 F.2d at 64, a physical assault upon a litigant by a judge was held not to be protected by judicial immunity although the judge unquestionably had jurisdiction over the litigant and over his own courtroom. Significantly, Gregory was discussed as precisely the activity not protected by judicial immunity in Stump, 435 U.S. at 361 n.10. Likewise, the misrepresentation by the judge in King, 766 F.2d at 968, that the plaintiff was the individual described by a warrant was held to be a

nonjudicial act. Similarly, the pursuit, arrest and prosecution of the plaintiffs by the judges in Lopez, 620 F.2d 1235 and Brewer, 692 F.2d 396-97 were held to be nonjudicial acts. In each of these cases, the courts held that although the judge arguably had jurisdiction, the unconstitutional conduct was not judicial activity.

To the extent reasoning of the lower court in the present case was correct, all of the above cases were wrongly decided. In all of the above cases, the judges were presiding over some proceeding in which plaintiffs were participating. In all of the above cases, the parties were relating with a judge serving in a judicial capacity.

Unlike the decisions in Gregory, King, Brewer, and Lopez, the lower court made no assessment of whether the

unconstitutional acts themselves were judicial acts.

The specific unconstitutional conduct itself substantially undermines any conclusion that the acts in question are judicial. These acts are not normally performed by a judge. The respondents created a false portion of a criminal record and altered the transcript, the docket sheet, and the filing stamp to conceal the falsification. The act of spinning the a clerk's filing stamp to back date the filing of a fabricated document cannot be considered an act normally performed by a judge. Actually, the preparation, preservation, and maintenance of the transcript of proceedings and the record are duties normally performed by court reporters and clerks. See Wisconsin Statutes, secs. 59.39(2), (3) and

757.57(5) (expressly allocating these duties to court reporters and clerks).

The parties did not deal with the judge in a judicial capacity. There was no notice to petitioner or her counsel of the alteration of the record, the transcript or the docket sheet. The judge did not issue any order that the record, the transcript or the docket sheet be altered. Indeed, the substantial efforts of the judge, the clerk and the court reporter to conceal their activities from plaintiff and her counsel belie any serious assertion that these respondents were relating to petitioner in a judicial capacity.

The present case is analogous to the ministerial, nondiscretionary duties held not judicially immune in Ex Parte Virginia, 10 Otto 339, 100 U.S. 339, 348-49, 25 L. Ed. 676 (1879). The

Supreme Court held in Ex Parte Virginia that a judge was not immune for his exclusion of colored persons from a jury. The Court concluded,

> Whether the act done by him was judicial or not is to be determined by its character, and not by the character of the agent. Whether he was a county judge or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge. It often is given to county commissioners, or supervisors, or assessors. In former times, the selection was made by the sheriff. In such cases, it surely is not a judicial act, in any such sense as is contended for here. It is merely a ministerial act, as much so as the act of a sheriff holding an execution, in determining upon what piece of property he will make a levy, or the act of a roadmaster in selecting laborers to work upon the roads.

Ex Parte Virginia, 100 U.S. at 348 (emphasis supplied).

A careful analysis of the fundamental principle underlying absolute judicial immunity, judicial independence in decision-making, also supports the preservation of the "judicial act" requirement. As the present case demonstrates, judicial immunity is absolute; redress for substantial injury caused by reprehensible unconstitutional conduct is totally denied. The doctrine of judicial immunity is to be broadly construed to protect independent decision-making yet tailored to protect precisely that interest. A meaningful "judicial act" requirement is necessary to tailor the absolute immunity to preserve independent judicial decision-making without immunizing a broad range of unconstitutional activity merely because it is performed by a judicial official.

Although the lower court went to considerable effort to elaborate numerous considerations supporting judicial immunity, all of which ultimately reduce to preservation of judicial independence, it totally failed to discuss how its decision furthered any of these considerations. (Ap. at A4-A5.) The immunization of actions falsifying a transcript, fabricating a part of a criminal record, backdating a fabricated document, altering a docket sheet, all in the attempt to conceal the fabrication from petitioner and her counsel, does not further the independence of the judiciary. The lower court did not state how the immunity it fashioned furthered any of the numerous considerations it enumerated. (Ap. at A4-A5.)

The lower court's decision in the present case abrogates the "judicial act"

requirement thus causing a conflict among the circuits, great confusion as to the scope of judicial immunity and an egregious result. If the "judicial act" requirement is to have any continued validity, this Court should grant certiorari in the present case.

III. THE DECISION BY THE COURT OF APPEALS EXTENDS ABSOLUTE JUDICIAL IMMUNITY TO THE MINISTERIAL ACTIVITIES OF CLERKS AND COURT REPORTERS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND CONTRARY TO THE PRINCIPLES UNDERLYING JUDICIAL IMMUNITY AS ENUNCIATED BY THIS COURT.

The Supreme Court has never decided whether absolute judicial immunity applies to court reporters and clerks, and if so, under what circumstances. As previously demonstrated, there is a raging conflict among the circuits on this issue. Lowe, 772 F.2d at 312; Holt, 741 F.2d at 169; Green, 722 F.2d at 1018. Rheuark, 628 F.2d at 305; Slavin, 574

F.2d at 1265-66; McLallen, 492 F.2d at 1298. Contra Briscoe v. LaHue, 663 F.2d 713, 722 n.6 (7th Cir. 1981), aff'd on other grounds, 460 U.S. 325 (1983); Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969); Dieu v. Norton, 411 F.2d 761 (7th Cir. 1969). The application of judicial immunity to court reporters and clerks desperately needs clarification by this Court, for the sake of petitioner, respondents, and the courts.

Unfortunately, the lower court's decision only increases the confusion. Apparently, the appellate court did view the proper performance of the duties involved, preparation of a transcript, preservation and maintenance of a record, as ministerial in nature. (Ap. at A5-A6.) The court reasoned, however, distinguishing its earlier decision in Lowe, 772 F.2d at 313, that the decision

to breach the proper performance of the duties was discretionary and therefore protected by absolute immunity. This is true for every act of constitutional abuse by judicial personnel.

An act violating constitutional rights might not be an act of discretion where such act was required by court order. Although there is no court order in the present case, ironically the Court of Appeals for the Seventh Circuit has recently held that nonjudicial officials performing ministerial acts pursuant to judicial direction are protected by absolute judicial immunity. Henry v. Farmer City State Bank, 808 F.2d 1228, 1238-39 (7th Cir. 1986). Thus, absolute immunity extends to virtually all actions of judicial administrators.

The appellate court failed to evaluate the the acts in question.

Entangled in its decision concerning the former judge while realizing that the proper performance of the acts in question really did involve ministerial duties, the court had to engage in the tortured reasoning that the decision by judicial administrators to breach ministerial duties and violate petitioner's constitutional rights is protected by absolute judicial immunity.

The instant case presents the Court with the opportunity to clarify this murky area of law and avoid substantial further confusion. Accordingly, this Court should grant certiorari and resolve whether and to what extent absolute judicial immunity applies to court reporters and clerks.

CONCLUSION

The twirling of a clerk's date stamp backward to back date a fabricated

document and thereby conceal the document's fabrication from petitioner and her counsel is not a judicial act. The extension of absolute judicial immunity to clerks and court reporters has never been decided by this Court. Therefore, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Dated this 9th day of April, 1987.

Respectfully submitted,

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APPENDIX OF THE PETITIONER, MARGUERITE EADES

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JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

January 30, 1987.

Before

Hon. WILLIAM J. BAUER, Chief Judge

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. RICHARD A. POSNER, Circuit Judge

MARGUERITE EADES,
Plaintiff-Appellant,
No. 86-1884
vs.
DONALD J. STERLINSKE, BRADLEY W. HUFF,
and JULIE EWALD,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
WESTERN DISTRICT OF WISCONSIN
No. 85 C 824
Judge John C. Shabaz

The cause was heard on the record from the United States District Court for

the Western District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

In the

United States Court of Appeals

For the Seventh Circuit

No. 86-1884

MARGUERITE EADES,

Plaintiff-Appellant,

v.

DONALD J. STERLINSKE, BRADLEY W. HUFF and JULIE EWALD,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 85 C 824—John C. Shabaz, *Judge.*

ARGUED OCTOBER 29, 1986—DECIDED JANUARY 30, 1987

Before BAUER, *Chief Judge,* CUMMINGS and POSNER, *Circuit Judges.*

BAUER, *Chief Judge.* The primary question presented in this appeal is whether the doctrine of judicial immunity shields a state court judge from liability for damages for alleged deprivation of plaintiff's constitutional rights to post-conviction relief and effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments. Additionally, we consider whether the judge's clerk and court reporter are shielded from liability for damages arising out of their participation in an alleged scheme to alter the trial record. The district court granted defendants'

motion to dismiss on the basis of absolute judicial immunity which we now affirm.

I.

Plaintiff, Marguerite Eades, was the defendant in a criminal action pending before Judge Donald Sterlinske in the Circuit Court of Rusk County, Wisconsin. Eades was convicted of two counts of welfare fraud. Defendant Bradley Huff was the court reporter for the criminal proceedings. Defendant Julie Ewald was the judge's clerk.

After the trial, plaintiff retained different counsel. Eades' new attorney requested a trial transcript to file post-conviction motions. After the request for a transcript was made, Judge Sterlinske allegedly dictated a false certificate to Huff misrepresenting the occurrence of an instruction and special-verdict conference which was never held. Additionally, Sterlinske allegedly caused Huff to alter the trial transcript and caused Ewald to alter the docket sheet record to indicate that the false certificate was filed. Plaintiff also alleges that Judge Sterlinske wrote a letter to the Parole Board of the State of Wisconsin for the purpose of disuading it from granting Eades parole. Eades was unaware of Judge Sterlinske's actions until she received a letter from the Judicial Commission for the State of Wisconsin indicating that disciplinary proceedings had been commenced against Judge Sterlinske.

Plaintiff brought an action for damages against Judge Sterlinske, Bradley Huff, and Julie Ewald alleging deprivation of her Sixth and Fourteenth Amendment rights. The district court granted defendants' motions to dismiss on the basis of absolute judicial immunity and this appeal followed.

II.

Plaintiff argues that Judge Sterlinske caused defendants Huff and Ewald to alter the transcript and the record. Plaintiff argues that these actions do not constitute judicial

acts and that therefore the district court's dismissal on grounds of absolute judicial immunity was erroneous and should be reversed. In deciding whether the district court correctly ruled in Judge Sterlinske's favor, we must first consider the general principles underlying the immunity defense.

The Supreme Court first articulated the current doctrine in *Bradley v. Fisher*, 13 Wall. 335 (1872), holding that in order to safeguard principled and independent decision-making, a judge may not be held to answer in civil damages for those judicial acts committed in the exercise of his jurisdiction. *See also Stump v. Sparkman*, 435 U.S. 349 (1978); *Pierson v. Ray*, 386 U.S. 547 (1967). The defense does not simply shield judges from civil liability, but also from the related trial proceedings. *Mitchell v. Forsyth*, 469 U.S. 929 (1985). It will not, however, protect a judge from injunctive relief, *see Pulliam v. Allen*, 466 U.S. 522 (1984), or from criminal prosecution, *see O'Shea v. Littleton*, 414 U.S. 488 (1974). Judicial immunity is a creature solely of the common law.[1] However, although it had the constitutional authority to do so, Congress did not abrogate the defense in enacting § 1 of the Civil Rights Act of 1871, now codified at 42 U.S.C. § 1983. *See Pierson*, 386 U.S. at 554-55.

The Supreme Court in *Bradley* identified five considerations in support of judicial immunity. First, a judge must be free to make decisions without fear of personal consequences. Second, because litigation necessarily involves controversy and competing interests, losing parties may be quick to ascribe malevolent motives to a judge. Third, a qualified "good faith" immunity would be virtually worthless because of the ease of alleging bad faith. Fourth, the

[1] Thus, judicial immunity differs from the immunity afforded members of Congress, as the latter is guaranteed by the Speech or Debate Clause of Art. I, § 6 of the Constitution. *See Doe v. McMillan*, 412 U.S. 306 (1973). In addition, judicial immunity affords less protection than legislative immunity under the Speech or Debate Clause. *See Dennis v. Sparks*, 449 U.S. 24, 30 (1980).

prospect of defending civil damage actions would force judges to employ otherwise unnecessary meticulous record-keeping and would render judges less inclined to rule forthrightly. Finally, other safeguards, such as appeal and impeachment reduce the need for private rights of action for damages against judges. *See Bradley*, 80 U.S. 13 Wall. at 347-54.

We turn now to the facts of this case. The plaintiff argues that defendants violated her constitutional rights to have post-verdict motions heard upon a transcript and record not fraudulently altered. The critical inquiry is whether Judge Sterlinske's actions were judicial acts and thus shield him from liability for damages. The Supreme Court in *Stump* developed a two-part test to determine whether a judicial act was at issue: first, whether the conduct in question is the kind normally performed by a judge; second, whether the plaintiff was dealing with the judge in his judicial capacity. The answer to the first prong is already established. Judge Sterlinske presided over the plaintiff's criminal trial and post-trial proceedings and thus was performing the normal duties of a judge. Second, by virtue of her status as a defendant in criminal proceedings, Eades' relationship to the judicial system makes immunity appropriate in light of the concerns expressed in *Bradley*. *Forester v. White*, 792 F.2d 647 (1986). The plaintiff was dealing with the judge in an official capacity since the acts involved post-trial proceedings. Assuming, *arguendo*, that the allegations of the complaint are true, Judge Sterlinske's actions are still judicial acts based upon the rationale set forth in *Stump*. "This immunity applies even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Pierson*, 386 U.S. at 554. We therefore hold that Judge Sterlinske's conduct, albeit reprehensible, is cloaked with absolute judicial immunity.

III.

Eades argues that defendants Huff and Ewald are not shielded from liability for damages under the doctrine of

judicial immunity. Plaintiff's reliance on our decision in *Lowe v. Letsinger*, 772 F.2d 308 (1985) is misplaced. In *Lowe* we said that a court clerk enjoys absolute immunity where he is performing nonroutine, discretionary acts akin to those performed by judges. There we said that the clerk of the court was not entitled to quasi-judicial immunity for allegedly concealing the entry of an order. The duty to type and send notice after entry of judgment, the facts in *Lowe*, is a non-discretionary, ministerial task. Here, defendants Ewald and Huff prepared and filed a false certificate summarizing an instruction conference that allegedly was never held, and altered the docket to reflect that falsity. In so doing, defendants Huff and Ewald breached their duties, and in that process exercised discretion. As such, their duties had an integral relationship with the judicial process and are cloaked by the traditional doctrine of judicial immunity. *Dieu v. Norton*, 411 F.2d 761, 763 (1969) (court reporter and court clerk, acting in discharge of their official duties, were protected by doctrine of judicial immunity); *Briscoe v. La Hue*, 663 F.2d 713 (1981) (court reporters at criminal proceedings were immune from liability under doctrine of judicial immunity); *Henry v. Farmer City State Bank*, No. 86-1024, slip op. at 18 (7th Cir. Dec. 29, 1986) (court clerks entitled to judicial immunity if their official duties have an integral relationship with the judicial process).

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—1-30-87—450

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

MARGUERITE EADES,

Plaintiff,

v.

MEMORANDUM AND ORDER

DONALD J. STERLINSKE, BRADLEY W. HUFF, and JULIE EWALD,

85-C-824-S

Defendants.

This is a civil action in which plaintiff Marguerite Eades seeks to obtain monetary damages because of defendants' alleged § 1983 violations and civil conspiracy. Defendant Sterlinske moves to dismiss the action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Sterlinske contends that the plaintiff's complaint fails to state a claim on which relief can be granted

against him because (1) Sterlinske enjoys absolute judicial immunity from liability for damages; (2) the statute of limitations for this action has passed; and (3) the complaint fails to allege any deprivation of rights, privileges or immunities secured by the United States Constitution and laws.

In deciding a motion to dismiss, the factual allegations of the complaint are taken as true, with all factual inferences drawn in favor of plaintiff. Wolfolk v. Rivera, 729 F.2d 1114, 1116 (7th Cir. 1984). Therefore, taking the allegations of the first amended complaint as true, and for the sole purpose of deciding this motion, the Court finds the following facts:

FACTS

On or about June 16, 1980, plaintiff Eades was criminally charged with two counts of welfare fraud by the State of Wisconsin the Circuit Court for Rusk County. In October 1980, a jury trial was held regarding these two counts of welfare fraud. Defendant Sterlinske, who was the circuit court judge of Rusk County, presided throughout the course of the criminal proceedings against plaintiff. At no time during the course of the trial was a jury instruction and verdict conference held. At the conclusion of the trial plaintiff Eades was convicted.

After the trial, Eades' trial attorney was replaced as Eades' attorney in the criminal proceedings against her. Eades' new attorney requested a trial

transcript for purposes of filing post-conviction motions. After Eades' new attorney requested a transcript for purposes of filing post-conviction motions, Sterlinske called his court reporter into his office and dictated a "certificate" in which he made certain untrue representations as to what had occurred with respect to the instruction and verdict conference. Sterlinske directed his court reporter to indicate in the certificate that a full-fledged instruction and verdict conference had taken place in Sterlinske's chambers, even though such a conference had not in fact occurred. Sterlinske also directed his court reporter to date the certificate as of the date of the trial, even though this was not the date on which it was prepared and signed. Finally,

Sterlinske caused his court reporter to alter the trial transcript so that it would be consistent with the false certificate.

On some day after January 29, 1981, Sterlinske caused the certificate to be stamped by his court reporter with the Clerk of Court's filing stamp, indicating that it had been placed in the court file on October 23, 1980, the original trial date. On some day after January 29, 1981, Sterlinske caused his clerk to alter the docket sheet record to indicate that the certificate was filed on October 23, 1980, the original trial date, even though the certificate was filed on a much later date.

After Eades' new attorney placed Sterlinske on notice that he intended to challenge the jury instructions, the jury verdict, and the instruction and verdict

conference, Sterlinske, in a letter dated April 9, 1981, represented to the attorney that "the file in the matter indicates that there was a conference held between all of the attorneys, the instructions were gone over carefully, and they were approved by both the district attorney and Mrs. Eades' counsel at that time."

Eades' post-conviction motions were denied. In Sterlinske's decision denying Eades' post-conviction motions, Sterlinske falsely stated:

> Prior to the submission of the verdict and the charge to the jury, the clerk's minutes indicate that a conference was held in chambers, and the attorneys for the parties stipulated and agreed that the verdicts as submitted to the jury were approved by both and likewise there was no objection to any of the instructions as proposed by the Court. This was accomplished at 3:43 p.m.

> after the closing of the testimony of the parties.

The Clerk's minutes did not indicate any of what Sterlinske purported that they contained.

Sterlinske sentenced Eades to two years in prison. When Eades was in prison, Sterlinske wrote to the Parole Board for the State Department of Health and Social Services regarding Eades to dissuade the Board from granting Eades parole at her initial parole hearing. In his letter, Sterlinske stated:

> It has been my policy not to express any feelings one way or the other when I receive notices of the initial parole hearing. I would, however, be rather interested in being apprised of this inmate's present attitude as it relates to the circumstances surrounding these offenses. It is usually inconsistent to accept full responsibility and acknowledge improper con-

> duct for which an inmate may be incarcerated on one hand, and then proceed with alternate remedies in seeking an appeal which at least seems to indicate an unwillingness to accept or recognize and acknowledge improper conduct.

Eades' request for parole was denied at her initial parole hearing. Eades served nine months in prison. Eades was in prison from December 16, 1980 to approximately September 6, 1981.

Eades did not obtain knowledge of Sterlinske's actions until a short time after February 11, 1985, when she received a letter from an attorney for the Judicial Commission for the State of Wisconsin.

Plaintiff filed suit against Sterlinske, alleging in her first amended complaint that Sterlinske's actions, which were under color of state law, deprived her of her constitutional rights of liberty to

a fair trial and effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment and her privileges and immunities as guaranteed by the Fourteenth Amendment. Plaintiff also alleges in her first amended complaint that the judge, the judge's clerk, and the court reporter conspired to deprive her of her constitutional rights.

OPINION

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1343.

Sterlinske has moved to dismiss plaintiff's complaint because (1) he enjoys absolute judicial immunity from liability for damages; (2) the statute of limitations for the action has passed; and (3) the complaint fails to allege any deprivation of rights, privileges, or immunities secured

by the United States Constitution and laws. This Court will address the issue of judicial immunity first.

Judges are immune from liability for damages for acts committed within their judicial jurisdiction. Pierson v. Ray, 386 U.S. 547, 553-54 (1967). Judge Sterlinske did have jurisdiction over the criminal proceeding against the plaintiff. The issue is whether Judge Sterlinske's alleged actions were "judicial actions." The factors that determine whether an act by a judge is a "judicial act" relate to (1) whether the act or decision involves the exercising of discretion or judgment, or is rather a ministerial act which might as well have been committed to a private person as to a judge, ex parte Virginia, 100 U.S. 339, 348 (1879); (2) whether the act

is a function normally performed by a judge; and (3) the expectations of the parties, i.e., whether the parties dealt with the judge in his judicial capacity. Stump v. Sparkman, 435 U.S. 349, 362 (1978). This Court finds that Judge Sterlinske's actions were judicial acts, and that therefore, Sterlinske is immune from liability for damages caused by those actions.

First, Judge Sterlinske failed to hold a jury instruction and verdict conference. The preparation of jury instructions and a verdict is a function normally performed by a judge to the expectation of the parties involved. Although Sterlinske committed a procedural error by failing to hold a jury instruction and verdict conference, a judge does not lose his immunity

because the action he took was in error. Stump v. Sparkman, 435 U.S. at 359.

Next, Sterlinske ordered the court reporter to prepare a certificate that certified that a jury instruction and verdict conference was held, and to date the certificate as of the date of the trial. He ordered the court reporter to stamp the certificate as filed October 23, 1980, although the certificate was not filed until after January 29, 1981. He ordered his clerk to change the docket sheet to indicate that the certificate was filed on October 23 1980, and he ordered the court reporter to alter the trial transcript to indicate that the non-existent conference occurred.

The Seventh Circuit's decision in Lowe v. Letsinger, 772 F.2d 308 (1985)

requires that these actions be characterized as judicial acts. The decision indicates that the Seventh Circuit takes a broad view of what is considered a judicial function. In Lowe, a criminal defendant brought a civil rights action against a state trial judge, a court clerk, and an attorney general. Lowe alleged that the three defendants conspired to conceal the entry of judgment on his state post-conviction petition that vacated his conviction. The Seventh Circuit held that the clerk's duty to send notice after entry of judgment was a nondiscretionary ministerial task. Id. at 313. However, the Seventh Circuit also held that if the judge undertook to control the giving of notice of entry of judgment, then the judge was performing a judicial function rather than an administrative function. Id.

The Seventh Circuit warned:

> To label some part of the judicial process as administrative or ministerial and thereby encroach on the judicial defense of absolute immunity, as disturbing as the judicial conduct may be, cannot be permitted. The functioning of the system is more important than some particular and rare judicial misdeed which can be dealt with in other ways, by appellate processes, the ballot, or in the federal system, by impeachment or other sanctions, . . .
>
> We are not holding that everything a judge does is judicial and clothed with absolute immunity, for if it is truly nothing more than purely ministerial or administrative the judge will not be absolutely immune, . . .

Id.

Taking the Seventh Circuit's broad view of what is considered a judicial function, it is impossible to conclude that Sterlinske's actions were not judicial

functions. Sterlinske's preparation of a certificate that certified that a jury instruction and verdict conference was held was a judicial action because supplementing the record is a function normally performed by a judge to the expectations of the parties. Sterlinske's ordering the court reporter to stamp the certificate as filed October 23, 1980, was a judicial function because where the judge undertakes to control the stamping of documents it is a judicial function. Sterlinske's ordering his clerk to prepare the docket sheet to indicate that the certificate was filed on October 23, 1980, was a judicial function because where the judge undertakes to control the docketing of documents it is a judicial function. Sterlinske's ordering the court reporter to alter the trial tran-

script was also a judicial function because ordering a court reporter to supplement the record is a judicial function normally performed by a judge.

Sterlinske's remaining actions were also judicial actions. Sterlinske's written response to plaintiff's appellate counsel informing him that a jury instruction and verdict conference was held was a judicial act because responding to attorneys' letters concerning cases is a function normally taken by a judge to the expectations of the parties involved. Sterlinske's denial of plaintiff's post-conviction motions was a judicial action because deciding motions is at the heart of a judge's function and the involved parties' expectations. Finally, Sterlinske's letter to the Parole Board concerning

plaintiff's parole hearing was a judicial act. In his capacity as a judge, Sterlinske was provided notice of initial parole hearings and responding to these notices is a function a judge would normally perform.

The defendant Sterlinske performed judicial acts. The transcript and letter to counsel all manufactured and altered at Sterlinske's direction do not make the functions which he performed something other than judicial acts. Even though these acts were fraudulent, false, and disgusting, the doctrine of judicial immunity cannot be nullified.

> Courts in this country and England have embraced the doctrine of judicial immunity for centuries. The doctrine is designed to give a judge the freedom to act upon his convictions, without fear of personal consequences. And

> the doctrine applies even when the judge is accused of acting maliciously and corruptly. Should a judge err through inadvertence or otherwise, a party's remedy is through appellate processes. Congress has the constitutional authority to abolish the immunity defense to any cause of action it creates, but it chose not to do so when it passed section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, under which Lowe sues.

(Citations omitted.) Lowe, 772 F.2d at 311.

Although the actions taken by defendant Sterlinske were shocking, this Court is not able to conclude that his absolute immunity should be lost. It is well settled that a judge does not lose his immunity because the judicial actions which he performed were malicious or corrupt. Stump v. Sparkman, 435 U.S. at 356. The judicial system provides for removal from

office those who tarnish it by performance in a false, fraudulent, malicious or corrupt manner. This, of course, may be of little solace to the plaintiff, but the doctrine mandating a free and independent judiciary cannot be set aside because of those rare instances brought to the Court's attention, as egregious as they might be.

The plaintiff's first amended complaint does not state a cause of action against the defendant Sterlinske because he enjoys absolute immunity for the actions alleged in this complaint.

Because this Court holds that plaintiff's first amended complaint fails to state a claim against Sterlinske, it will not address the contentions that the statute of limitations for this action has passed or that the complaint fails to

allege any deprivation of rights, privileges or immunities secured by the United States Constitution and laws.

ORDER

IT IS ORDERED that plaintiff's complaint against defendant Sterlinske is DISMISSED, without costs.

Entered this 13th day of February, 1986.

BY THE COURT:

JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARGUERITE EADES,

Plaintiff,

CORRECTED ORDER

v.

85-C-824-S

DONALD J. STERLINSKE,
BRADLEY W. HUFF, and
JULIE EWALD,

Defendants.

The Court's memorandum and order of February 13, 1986 in the above entitled matter addressed itself to the plaintiff's first amended complaint,

Accordingly,

ORDER

IT IS ORDERED that plaintiff's first amended complaint against defendant Sterlinske is DISMISSED without costs.

IT IS FURTHER ORDERED that judgment shall not be entered upon this order at this time.

Entered this 19th day of February, 1986.

BY THE COURT:

JOHN C. SHABAZ
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARGUERITE EADES,

Plaintiff,

MEMORANDUM AND ORDER

v.

85-C-824-S

DONALD J. STERLINSKE,
BRADLEY W. HUFF, and
JULIE EWALD,

Defendants.

This is a civil action in which plaintiff Marguerite Eades seeks to obtain monetary damages because of defendants' alleged § 1983 violations. Defendants Huff and Ewald move to dismiss the action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. They contend that the plaintiff's complaint fails to state a claim on which relief can be granted against them because (1) they enjoy absolute judicial immunity or qualified

immunity from liability for damages; and (2) the statute of limitations for this action has passed. Huff further argues that the complaint fails to allege any deprivation of rights, privileges or immunities secured by the United States Constitution and laws, and that the complaint is actually against the State of Wisconsin and barred by the Eleventh Amendment.

In deciding a motion to dismiss, the factual allegations of the complaint are taken as true, with all factual inferences drawn in favor of plaintiff. Wolfolk v. Rivera, 729 F.2d 1114, 1116 (7th Cir. 1984). Therefore, taking the allegations of the first amended complaint as true, and for the sole purpose of deciding this motion, the Court finds the following facts:

FACTS

On or about June 16, 1980, plaintiff Eades was criminally charged with two counts of welfare fraud by the State of Wisconsin in the Circuit Court for Rusk County. In October 1980, a jury trial was held regarding these two counts of welfare fraud. Sterlinske, who was the Circuit Court Judge of Rusk County, presided throughout the course of the criminal proceedings against plaintiff. At no time during the trial was a jury instruction and verdict conference held. At the conclusion of the trial plaintiff Eades was convicted.

After the trial, Eades' trial attorney was substituted. Eades' new attorney requested a trial transcript for purposes of filing post-conviction motions. After Eades' new attorney

requested a transcript for purposes of filing post-conviction motions, Sterlinske called his court reporter, defendant Huff, into his office and dictated a "certificate" in which he made certain untrue representations as to what had occurred with respect to the instruction and verdict conference. Sterlinske directed defendant Huff to indicate in the certificate that a full-fledged instruction and verdict conference had taken place in Sterlinske's chambers, even though such a conference had not in fact occurred. Sterlinske also directed Huff to date the certificate as of the date of the trial, even though this was not the date on which it was prepared and signed. Finally, Sterlinske caused Huff to alter the trial transcript so that it would be consistent with the false certificate.

On some day after January 29, 1981, Sterlinske caused the certificate to be stamped by Huff with the Clerk of Court's filing stamp, indicating that it had been placed in the court file on October 23, 1980, the original trial date. On some day after January 29, 1981, Sterlinske caused his clerk, defendant Ewald, to alter the docket sheet record to indicate that the certificate was filed on October 23, 1980, the original trial date, even though the certificate was filed on a much later date.

Both defendants knew the certificate was false and knew that the stamping and insertion was done for the purpose of misleading others. Neither notified the parties to the criminal proceeding of the false certificate.

Plaintiff was sentenced to two years in prison, serving nine months. She was in prison from December 16, 1980 to approximately September 6, 1981.

Plaintiff did not obtain knowledge of defendants' actions until a short time after February 11, 1985, when she received a letter from an attorney for the Judicial Commission for the State of Wisconsin.

Plaintiff filed suit against defendants, alleging in her complaint that defendants' actions, which were under color of state law, deprived her of her constitutional rights of liberty to a fair trial and effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendment and her privileges and immunities as guaranteed by the Fourteenth Amendment.

OPINION

The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1343.

The Court will address the issue of immunity.

Judicial immunity protects a court reporter and circuit court clerk acting in the discharge of their official responsibilities. Dieu v. Norton, 411 F.2d 761, 763 (7th Cir. 1969); Briscoe v. LaHue, 663 F.2d 713, 722 (7th Cir. 1981). This Court believes that the defendants Huff and Ewald acted in the discharge of their official responsibilities as court reporter and court clerk, respectively, and therefore are entitled to judicial immunity.

Huff, at the judge's direction, prepared a certificate and made the trial transcript consistent with the certifi-

cate. Huff also, at the judge's direction, stamped the certificate with the Clerk of Court's filing stamp. These actions, taken at the judge's direction, are not outside the scope of a court reporter's official responsibilities. Accordingly, Huff's actions are protected by judicial immunity.

Ewald, at the Judge's direction, amended the docket sheet record to indicate that the certificate was filed on October 23, 1980. These actions, taken at the Judge's direction, are not outside the scope of a circuit court clerk's official responsibilities. Accordingly, Ewald's actions are protected by judicial immunity.

The decision in Lowe v. Letsinger, 772 F.2d 208 (7th Cir. 1985), concerning the court clerk is inconsistent with the Seventh Circuit's prior holding in

Dieu. Dieu holds that a court clerk or court reporter is entitled to judicial immunity as long as he or she is acting in the discharge of his or her official responsibilities, regardless of whether those responsibilities are discretionary or ministerial. Under Dieu, as stated above, court reporter Huff and clerk Ewald would be entitled to judicial immunity. Lowe, on the other hand, holds that they are entitled to judicial immunity only if "[they are] performing nonroutine, discretionary acts akin to those performed by judges."[1] If the court clerk and reporter

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[1] This Court is somewhat confused by the Lowe court's definition of a ministerial versus a discretionary act. The court seems to say that if a judge mails a notice of entry of an order, that mailing is a discretionary act. However, the court also seems to say that if a clerk mails the same notice it is a ministerial act. If a clerk is entitled to judicial cont'd.

are performing ministerial acts, they are not entitled to judicial immunity but may be entitled to qualified immunity. Under Lowe, court reporter Huff and clerk Ewald most likely would not be entitled to judicial immunity, but might be entitled to qualified immunity.

Given the different results of Dieu and Lowe, this Court must determine which case is controlling. The Seventh Circuit's decision in Dieu is still controlling for several reasons. First, the court in Lowe did not specifically overrule Dieu. Second, the court in Lowe did not even discuss and distinguish Dieu in its opinion. Third, the court in Lowe stated

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immunity when he performs acts akin to a judge, should not the clerk be given judicial immunity for mailing a notice if a judge would have been given judicial immunity for mailing the same notice?

that "for some reason the clerk unfortunately dropped from sight on appeal, filed no briefs, and was not represented at oral argument." Lowe, 772 F.2d at 313 n. 6. Therefore, the court in Lowe may not have had the opportunity to fully examine the Seventh Circuit's opinion in Dieu. For these reasons, this Court believes the Seventh Circuit's decision in Dieu is still controlling.

Under Dieu, the actions of defendants Huff and Ewald are protected by judicial immunity.

Although there may be those of us not sophisticated enough to comprehend the distinction, nonetheless it appears Draconian to this Court to provide absolute immunity to the trial judge, and rightfully so in order to maintain a truly independent

judiciary, and yet to hold his staff, clerk and reporter, liable for those very actions for which absolute judicial immunity has been previously provided.

Defendants' motions to dismiss on the basis of absolute immunity are granted. The Court need not address the other three grounds for dismissal. The Court does question, however, whether defendants' actions deprived plaintiff of any rights, privileges or immunities secured by the United States Constitution and Laws.

ORDER

IT IS ORDERED that defendant Huff's motion to dismiss the complaint against him is GRANTED.

IT IS FURTHER ORDERED that defendant Ewald's motion to dismiss the complaint against her is GRANTED.

Entered this 30th day of April, 1986.

BY THE COURT:

JOHN C. SHABAZ
District Judge

JUDGMENT IN A CIVIL CASE
United States District Court
Western District of Wisconsin

Marguerite Eades,
Plaintiff,

Docket Number 85-C-824-S

v.

Judge John C. Shabaz

Donald Sterlinske, Bradley J. Huff and Julie Ewald,
Defendants.

_____ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** This action came on for consideration before the Court with the judge named above presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

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that the motions to dismiss filed by the defendants are granted, and judgment is entered against the plaintiff dismissing her case.

Joseph W. Skupniewitz, Clerk

May 1, 1986

(By) Deputy Clerk
/s/, Warren H. Nelson, Chief Deputy

87-37

Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

MARGUERITE EADES,

v. Petitioner,

DONALD J. STERLINSKE, BRADLEY W. HUFF, and JULIE EWALD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS, DONALD J. STERLINSKE AND BRADLEY W. HUFF, IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPLEMENTAL APPENDIX

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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

MARGUERITE EADES,

Petitioner,

v.

DONALD J. STERLINSKE, BRADLEY W. HUFF, and JULIE EWALD,

Respondents.

BRIEF OF RESPONDENTS, DONALD J. STERLINSKE AND BRADLEY W. HUFF, IN OPPOSITION TO GRANTING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The respondent Donald J. Sterlinske, reflecting his judicial status at all times material herein, shall be hereinafter called "Judge Sterlinske;" the respondent Bradley W. Huff, reflecting his status as a Wisconsin circuit court reporter, "Reporter Huff;" respondent

Julie Ewald, reflecting her status as a deputy clerk of circuit court, "Clerk Ewald;" and the petitioner, "Eades."[1]

QUESTION PRESENTED FOR REVIEW

Judge Sterlinske and Reporter Huff submit that the three questions discerned by Eades as presented for review herein are too numerous, and also objectionable for other reasons.[2] Such respondents

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[1]The official status of Judge Sterlinske is alleged in the Complaint (Supp. App. 103) and First Amended Complaint herein (Supp. App. 115), while that of Reporter Huff is alleged in the First Amended Complaint (id.).

[2]What Eades discerns as the second question presented for review herein is particularly objectionable because it refers to "the spinning of a clerk's date stamp to fraudulently back date a fabricated record", despite the fact that there is no allegation of such "spinning" in either the Complaint or First Amended Complaint (hereinafter "F.A.C."). The second Eades-discerned question erroneously characterizes as "ministerial" acts of Reporter Huff and Clerk Ewald which, as is clear from both the Complaint and (Footnote Continued)

submit that there is but one question

F.A.C., and as found by the Court of Appeals (App [sic]), were discretionary in character. The third Eades-discerned question is also objectionable, in its reference to "a jury instruction conference never held in a criminal proceeding," with its implication that the non-holding of such conference was a fact well pleaded which the trial court had to accept as true on respondents' dismissal motion. It is true that both the Complaint and F.A.C. state that at no time during the course of the trial was there held, in the words of the Complaint "an instruction and verdict conference" (Supp. App. 103), and, in the words of the F.A.C., "a jury instruction and verdict conference" (Supp. App. 116). Such statement, however, is a conclusion of law rather than an allegation of fact, or at best, a mixed conclusion of law and allegation of fact; in either case not a "fact well pleaded" to be taken as true on a dismissal motion. Moreover, the statement in the Complaint that Judge Sterlinske directed Reporter Huff "to indicate in the certificate that a full-fledged instruction conference had taken place in Sterlinske's chambers even though such a conference had not in fact occurred" (emphasis supplied; Supp. App. 104-05) and the same statement in the F.A.C. (except that it refers to "a full-fledged instruction and verdict conference"; see Supp. App. 118), clearly imply that an "instruction and verdict conference", though not "full-fledged", had occurred during Eades' criminal trial.

presented for review herein, to wit: Did the Court of Appeals err in upholding the District Court's dismissal of this action against Judge Sterlinske and Reporter Huff, on the basis of their judicial immunity thereto?[3]

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[3]In referring to "this action" herein, it should be observed that such term does not include the "Plaintiff's Third Cause of Action" for "civil conspiracy" (Supp. App. 128-30). As stated at p. 2 of Eades' "Brief and Appendix of Plaintiff-Appellant", of which this Court make take judicial notice, filed in the Court of Appeals, "The civil conspiracy claims, as alleged by the third cause of action in the Amended Complaint, were dismissed as to all defendants by stipulation and are not an issue on appeal."

TABLE OF CONTENTS AND TABLE OF AUTHORITIES

CASES CITED

STATEMENT OF THE CASE

This statement is deemed necessary in order to correct certain inaccuracies and omissions in Eades' "Statement of the Case."

At p. 3, of Petition, it is stated unequivocally that Eades' "was imprisoned for nine months as a result of the unconstitutional acts of defendants." (Emphasis supplied.) The Petition, at p. 7, states in pertinent part: "Relying upon the altered record, Sterlinske attempted to dissuade the new counsel from making post-conviction motions. Sterlinske later relied on the fictitious instruction conference to deny post-conviction motions. Sterlinske then sentenced Eades to two years in prison. Eades served nine months in prison." (Emphasis supplied.)

The clear import of these statements is that it was after the Eades' trial record had been altered, and after Judge Sterlinske engaged in certain described conduct subsequent to such alteration, that he "then" sentenced Eades to two years in prison, with Eades then serving nine months of such sentence.

As the F.A.C. itself shows, it is grossly inaccurate to imply, as does the Petition in its above-quoted portions, that Eades, after the acts complained of occurred, was sentenced and then commenced to serve and served nine months imprisonment, in the language of the Petition, "as a result of" such acts. Such acts were not just post-trial, but post-sentencing. As stated in Para. 25, F.A.C. (Supp. App. 123), ". . . Eades served nine months in prison. Eades was in prison from December 16, 1980 to

approximately September 6, 1981." (Emphasis supplied.) But the F.A.C. alleges that it was "on some day after January 29, 1981", meaning at least nearly 1 and 1 1/2 months after Eades commenced serving her sentence, that several of the acts complained of occurred (see Paras. 17, 18, F.A.C.; Supp. App. 119), with several more of such acts allegedly occurring in April, 1981 (see Paras. 21, 24, F.A.C.; Supp. App. 120-23). Still another of the acts complained of, the making of an allegedly false statement in Judge Sterlinske's "decision on post-conviction motions" (see Para. 22; Supp. App. 121-22) obviously could not have occurred until May 22, 1981, the date when such decision was rendered. See Supp. App. 134-59. And while the F.A.C. contains no allegation as to just when Judge

Sterlinske dictated the certificate in question, except to aver that such act occurred "After Hertel requested a transcript for purposes of filing post-conviction motions" (Para. 14, F.A.C.; Supp. App. 117), the above-mentioned decision of Judge Sterlinske shows that such request by post-conviction defense counsel was not made until January 16, 1981. See Supp. App. 150. Thus, it is readily apparent that Eades did not serve nine months imprisonment "as the result of" the acts complained of, since such acts clearly did not occur for weeks, and in some instances, for months, after Eades commenced serving her sentence, as

alleged in the F.A.C., on December 16, 1980.[4]

As above shown, the Petition, p. 7, states that, "Relying upon the altered record, Sterlinske attempted to dissuade the new counsel from making post-conviction motions." (Emphasis supplied). It is true that the F.A.C., in its Para. 21, alleges that Judge Sterlinske "attempted to persuade Hertel [Eades' post-conviction counsel] not to challenge the jury instructions, jury verdict, and the instruction verdict conference" (bracketed material supplied; Supp. App. 120), and that Para. 16 of the Complaint alleged, in pertinent part, that, "In a letter to Attorney Hertel,

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[4]In making this statement, there is no intent to imply, and it is not implied, that any part of Eades' nine-month imprisonment was served as the result of the acts of which she complained.

Sterlinske further attempted to persuade Hertel not to challenge the jury instructions and verdict" (Supp. App. 106); but such allegations, assuming their truth, are plainly not allegations that Judge Sterlinske attempted to dissuade Hertel "from pursuing post-convictions motions," but are merely allegations that he attempted to dissuade Hertel from raising certain questions on post-conviction motion.

At pp. 7, 8, the Petition states, "Petitioner Eades brought the present action against the respondents for their participation in a scheme which fabricated and falsely altered a criminal trial record and transcript." (Emphasis supplied.) Had such "scheme" been alleged in the plaintiff's First and/or Second Causes of Action set forth in the F.A.C., and assuming the truth of such

allegation, such statement would go unchallenged herein; but since such causes of action contain no "scheme" allegation, such statement is manifestly inaccurate and unwarranted. The allegations of the F.A.C. that "Sterlinske, Huff, and Ewald all knew that the certificate was false. The participation of each in the stamping of the certificate and the insertion of it into the record was done with the intention of misleading others, including Eades and her counsel, regarding the proceedings at trial" (Supp. App. 119-20) are clearly not allegations of a "scheme," which, as employed in the above-quoted statement from the Petition, plainly has a connotation of "conspiracy;" and, of course, the "conspiracy" allegations of the Plaintiff's Third Cause of Action (Supp. App. 128-30), dismissed by

stipulation of the parties, as above shown, lend no support to such "scheme" statement, since such allegations are not even subject to consideration herein, let alone being matters which are to be "taken as true."

The Petition, at p. 4, states that, "No jury instruction and verdict conference was held during the trial." As above shown, however, the F.A.C. clearly implies that such a conference, albeit less than "full-fledged" was held at Eades' trial; with such implication also found in the Petition's statement, at p. 5, that, "The 'certificate' represented that a complete instruction and verdict conference was held when no such conference had, in fact, been held." (Emphasis supplied.)

At p. 6, the Petition states: "Sterlinske also directed Huff to falsely alter the transcript to be consistent with the false certificate." This statement is clearly incompatible with the allegation of Para. 15, F.A.C., Supp. App. 118, that, "Finally, Sterlinske caused Huff to alter the trial transcript so that it would be consistent with its false certificate." Notably absent from such allegation is the employment of the word "falsely" before the word "altered."

The Petition, p. 7, states that, "The respondents knew that the certificate was false and knew that its creation and insertion into the record was fraudulent and for the purpose of misleading Eades and her new counsel about the proceedings at trial." This language closely tracks the allegations appearing in Para. 19, F.A.C. (Supp. App.

119-20); and, like such allegations, represents mere conclusions of Eades, rather than facts properly stated in a "Statement of the Case."

The Petition, p. 6, asserts that, "After January 29, 1981, Sterlinske caused Huff to rotate the date stamp on the Clerk of Court's filing stamp backwards to stamp the 'certificate' as filed on October 23, 1980, the trial date." This assertion clearly contains another and somewhat amplified version of the above-noted portion of the second Eades-discerned question, namely, "The spinning of a clerk's date stamp to fraudulently back date a fabricated record"; and the act described in such amplified version is not alleged either in the Complaint or in the F.A.C., and is

therefore improperly presented herein by Eades as if it were a fact.[5]

In addition to the inaccuracies above noted in Eades' "Statement of the Case", there are certain factual omissions therefrom. One is the date of Eades sentencing, December 9, 1980. See Supp. App. 149. Another is the language from the certificate in question which reads: "It was also agreed and stipulated between counsel and the Court that the Court answer the question as to the computation of the monetary amount of aid received and support furnished." This language was omitted by Eades because of her apparent belief that it is irrele-

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[5]It should be noted that such non-alleged act makes two further appearances in the Petition, outside of the "Statement of the Case," boldly stated as if it were well-pleaded fact, and even leading off the Conclusion therein! See Petition, pp. 21; 29, 30.

vant. See Petition, p. 5. It is relevant, however, by reason of the fact that Eades, though expressly and repeatedly referring to the certificate in question as "false" (see Petition, p. 7, and Para. 19, F.A.C.; Supp. App. 119), has conceded the truth of the above-quoted portion thereof by raising no challenge to its veracity in her pleadings.

SUMMARY OF ARGUMENT

The argument presented infra may be summarized as follows:

(1) There is no merit to Eades' principal reason for granting certiorari herein, namely, her "judicial act" argument or reason. Such reason is nothing but a thinly disguised contention that this Court should grant certiorari herein in order to eviscerate the defense of

absolute judicial immunity by reviving an exception thereto briefly recognized by this Court in 1869, but with such recognition swiftly and wisely withdrawn only three years later. Eades, in making her "judicial act" argument, conceives of the acts of Judge Sterlinske, Reporter Huff, and Clerk Ewald, of which she complains, as not being "judicial acts" because of what she alleges to be their illegal and malicious nature. Such concept runs afoul of this Court's holding in Stump v. Sparkman, 435 U.S. 349, reh. denied, 436 U.S. 951 (1978). And allegations of the F.A.C., viewed in light of Harper v. Merckle, 638 F.2d 848 (5th Cir. 1981) show acts complained of by Eades as clearly being "judicial acts."

(2) The second reason presented by Eades for claiming certiorari herein is that there is a conflict between the

decisions of the federal courts of appeals as to whether judicial immunity should extend to court reporters and clerks of court. This Court has made it plain that only where such a conflict is "real and embarrassing" will it serve as a valid reason for granting certiorari. The conflict here in question, though real enough, is plainly not "embarrassing," for reason discussed. Clearly, then, Eades' "conflict between the circuits" reason for granting certiorari herein is meritless. And even if it were not, it would provide a valid reason for issuing writ herein only as to so much of the decision in question as accorded judicial immunity to Reporter Huff and Clerk Ewald.

(3) The third reason advanced by Eades for granting certiorari herein is that the decision by the Court of Appeals

extends absolute judicial immunity to the ministerial activities of clerks and court reporters. This gambit of labeling (or, as here, mis-labeling) a part of the judicial process as "ministerial" has rightly been viewed as impermissible in Lowe v. Letsinger, 772 F.2d 308 (7th Cir. 1985), in language quoted.

(4) Certain other reasons for granting ceritorari advanced by Eades under the heading "Introduction" are also meritless, including the reason that, "There is no Supreme Court decision on whether and under what circumstances judicial immunity applies to court reporters and clerks."

(5) The statement by Eades that "for reasons known only to the Attorney General of the State of Wisconsin, the respondents have never been criminally prosecuted," implying misconduct or worse

on the part of the Attorney General, is unsupported by anything in the record, and reveals a regrettable and dismal ignorance of Wisconsin law, for reasons shown.

ARGUMENT

THE REASONS PRESENTED BY EADES FOR GRANTING THE WRIT OF CERTIORARI SOUGHT HEREIN ARE DEVOID OF MERIT.

A.

The principal reason advanced by Eades as to why the writ sought herein should issue is embodied in that part of her Argument II heading which reads, "The decision by the Court of Appeals essentially abrogates the judicial act requirement contrary to prior decisions of this Court and other circuits [sic] . . ." (Petition, p. 14).

This "judicial act" argument or reason is, it is submitted, nothing more

than a thinly disguised contention that this Court should grant certiorari herein in order to eviscerate the defense of absolute judicial immunity by reviving an exception thereto briefly recognized by this Court in 1869, but with such recognition swiftly and wisely withdrawn only three years later. Such recognition occurred in Randall v. Brigham, 7 Wall. 523, 526, 19 L. Ed. 285, 291 (1869), wherein the Court, referring to "judges of superior or general authority", said "They are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, unless perhaps where the acts, in excess of jurisdiction, are done maliciously or corruptly." (Emphasis supplied.) But the principle of judicial immunity was pruned of the qualifying language above emphasized when the Court in Bradley v.

Fisher, 13 Wall. 335, 351, 20 L. Ed. 646, 651 (1872) held that, "[J]udges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." (Emphasis supplied.) As to the repudiation of such exception, see also Sparks v. Duval County Ranch Co., Inc., 604 F.2d 976, 980 n.6 (5th Cir. 1979); Harper v. Merckle, 638 F.2d 848, 857 (5th Cir. 1981).

It is plain that Eades, in making her "judicial act" argument, conceives of the acts of Judge Sterlinske, Reporter Huff, and Clerk Ewald, of which she complains, as not being "judicial acts" because of what she alleges to be their illegal and malicious nature. See Para. 27, F.A.C., Supp. App. 124-25;

Para. 46, F.A.C., Supp. App. 131. But such concept runs afoul of this Court's holding in Stump v. Sparkman, 435 U.S. 349, reh. denied, 436 U.S. 951 (1978), that, ". . . A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'[7] 13 Wall., at 351." (Footnote omitted; emphasis supplied; 435 U.S. at 356-57.)

In language which is most apposite herein, as showing how meritless is Eades' "judicial act" argument or reason, the Fifth Circuit has stated:

> In this imperfect world, . . . where even the moon has a dark side, this manifestly necessary policy [of absolute judicial immunity] has the unfortunate effect of insulating not only the robe, but the person within it, from

> being called to account for actions that may be illegal, even corrupt, as is alleged here. This undesirable side effect of an otherwise valuable prescription can, as to the magistrate himself, be safely mitigated only slightly. All authorities[6] recognize that when a judge acts in a 'clear absence of all jurisdiction' he is not protected. But any broader or less explicit inroad upon the robe's immunity in an attempt to reach its wearer would invite recurring attempts at enlargement, ruinous in terms of judicial time and funds expended to defend--even successfully--against them. Thus the rule of judicial immunity from damages, with its single, bright-line exception, is as broad as, but no broader than, is necessary.

(Emphasis supplied; Sparks v. Duval County Ranch Co., Inc., cited supra, 604 F.2d at 980).

In closing this sub-argument, certain language from Harper v. Merckle, cited supra, 638 F.2d 848, warrants quoting, in view of certain features of the F.A.C. In note 9 thereof (id. at 856), the Court stated in part,

"Moreover, as our analysis infra at p. 859 & n.17 reveals, we can envision no situation--where a judge acts after he is approached qua judge by parties to a case--that could possibly spawn a successful § 1983 suit". (Emphasis supplied.) And here, of course, as Paras. 13 and 14, F.A.C., Supp. App. 117 show, Judge Sterlinske took his actions complained of only after Eades' post-conviction counsel sought a trial transcript from the trial court in order to file post-conviction motions in the Eades' criminal case, still before such court after Eades' conviction and sentencing.

Harper v. Merckle, which ruled that certain actions of a judge there in question were not "judicial acts" under circumstances markedly different than those here involved, cautioned that "our

holding is exceedingly narrow and is tailored to this, the rarest of factual settings[17]" (footnote omitted; 638 F.2d at 859), then stating that, ". . . we hold only that when it is beyond reasonable dispute that a judge has acted out of personal motivation and has used his judicial office as an offensive weapon to vindicate personal objectives, and it further appears certain that no party has invoked the judicial machinery for any purpose at all, then the judge's actions do not amount to 'judicial acts.' . . ." (Emphasis supplied; id.) Under this definition of when a judge's actions are not "judicial acts", it is plain, in the light of the F.A.C., first, that it appears certain that Eades, through her post-conviction counsel, did invoke "the judicial machinery" through his transcript request; and such invocation, in

and of itself, would under such definition preclude any holding that Judge Sterlinske's actions in question do not amount to "judicial acts." Second, it is plain that even if all the facts well-pleaded in the F.A.C. are taken to be true, it cannot be said to be "beyond reasonable dispute" that Judge Sterlinske "acted out of personal motivation and has used his judicial office as an offensive weapon to vindicate personal objectives."

B.

A second reason presented by Eades for issuance of the writ she seeks, though presented somewhat obliquely, is that there is a conflict between the decisions of the federal courts of appeals as to whether judicial immunity should extend to court reporters and

clerks of court.[6] Eades hyperbolically describes such conflict as "raging" (Petition, p. 26), though neither the case law she cites evidencing such conflict, nor any other case law, bears out such description. This Court has made it plain that only where such a conflict is "real and embarrassing" (emphasis supplied) will it serve as a valid reason for granting certiorari. See Layne & Bowler Corp. v. Western Well Works, 67 L. Ed. 712, 714 (1923). The conflict here in question, though real

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[6] In agreement with Seventh Circuit decisions granting judicial immunity to clerks of court and court reporters is the law of the Ninth Circuit. See Stewart v. Minnick, 409 F.2d 826 (9th Cir. 1969). The Second, Fifth, and Eighth Circuits hold that a court reporter has only a qualified immunity to a damages action. See, Green v. Maraio, 722 F.2d 1013, 1018-19 (2d Cir. 1983); Rheuark v. Shaw, 628 F.2d 297, 305 (5th Cir. 1980); Holt v. Dunn, 741 F.2d 169 (8th Cir. 1984).

enough, is plainly not "embarrassing," since it merely shows federal courts of appeal of two different minds on the question of conferring judicial immunity on court personnel other than judges, with even the courts refusing such immunity to such personnel recognizing that they possessed another formidable immunity to an action for damages, i.e., the so-called "qualified" immunity. Clearly, then, Eades' "conflict between the circuits" reason for granting certiorari herein is meritless.

Finally, it should be noted that even if the conflict above-described were "embarrassing," it would provide valid reason for granting certiorari herein only as to so much of the decision here in question as accorded judicial immunity to Reporter Huff and Clerk Ewald.

C.

A third reason advanced by Eades for granting certiorari herein is that "The decision by the Court of Appeals extends absolute judicial immunity to the ministerial activities of clerks and court reporters in conflict with decisions of other circuits and contrary to the principles underlying judicial immunity as enunciated by this Court." (Petition, p. 26.) The gambit of labelling (or, as here, mis-labelling) a part of the judicial process as "ministerial", resorted to by Eades in advancing her "third reason" above described, has rightly been viewed as impermissible in Lowe v. Letsinger, 772 F.2d 308, 313 (7th Cir. 1985), wherein the Court said:

> . . . To label some part of the judicial process as administrative or ministerial and thereby encroach on the

> judicial defense of absolute immunity as disturbing as the judicial conduct may be, cannot be permitted. The functioning of the system is more important than some particular and rare judicial misdeed which can be dealt with in other ways, by appellate processes, the ballot, or, in the federal system, by impeachment or other sanctions, 28 U.S.C. § 372(c).

(Emphasis supplied.)

D.

Eades, under the heading "Introduction", has advanced reasons other than those above discussed for granting certiorari herein. See Petition, pp. 9-14. It is submitted that they are also meritless, including the reason that, "There is no Supreme Court decision on whether and under what circumstances judicial immunity applies to court reporters and clerks." (Petition, p. 11.)

E.

In closing this argument, it must be noted that Eades, magisterially pronouncing that the respondents herein violated a Wisconsin criminal statute, then states "for reasons known only to the Attorney General of the State of Wisconsin, the respondents have never been criminally prosecuted." Note 2, Petition, p. 9. This ugly and unfounded language, implying misconduct or worse on the part of the Attorney General, is unsupported by anything in the record, and reveals a regrettable and dismal ignorance of Wisconsin law. Under such law, the Attorney General has no supervisory control over district attorneys in their prosecutorial work at the trial court level; under it, it would have been the District Attorney of Rusk County, Wisconsin, who would have decided if the

actions of respondents in question warranted criminal prosecution; and under such law, prosecutorial discretion is very broad, and is in no sense or degree controlled by the Attorney General of Wisconsin, so that he would be privy to how and why such discretion was exercised.

CONCLUSION

For the reasons above shown, the Petition should be denied.

Respectfully submitted,

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Attorney General
State of Wisconsin

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Assistant Attorney General

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SUPPLEMENTAL APPENDIX OF RESPONDENTS,
DONALD J. STERLINSKE AND
BRADLEY W. HUFF

INDEX TO SUPPLEMENTAL APPENDIX
OF RESPONDENTS, DONALD J. STERLINSKE
AND BRADLEY W. HUFF

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARGUERITE EADES,

COMPLAINT

Plaintiff,

-vs- Case No. 85-C-824-D

DONALD J. STERLINSKE,

Defendant.

INTRODUCTION

NOW COMES the plaintiff Marguerite Eades by her attorneys, Fox, Fox, Schaefer & Gingras, S.C., by Robert J. Gingras and Mathews Law Office, by Daniel G. Mathews, and as and for a complaint against the defendant Donald J. Sterlinske alleges as follows:

JURISDICTION AND VENUE

1. Jurisdiction is conferred on this Court by 28 U.S.C. § 1343.

2. This claim may be venued in the Western District of Wisconsin pursuant to

28 U.S.C. § 1391 insofar as the plaintiff resides in this district, and the acts alleged as the basis for plaintiff's claim occurred within the boundaries of said district.

PARTIES

3. Plaintiff Marguerite Eades (hereinafter referred to as "Eades") is an adult resident of Wisconsin residing at Woodruff, Wisconsin.

4. The defendant Donald J. Sterlinske (hereinafter referred to as "Sterlinske") is an adult resident of Wisconsin residing at Route 1, Tony, Wisconsin 54563.

GENERAL ALLEGATIONS

5. On or about June 16, 1980, Eades was charged criminally with two counts of welfare fraud by the State of

Wisconsin in the Circuit Court for Rusk County. Sterlinske presided as judge throughout the course of the criminal proceedings against Eades.

6. In approximately December of 1980, a trial was held regarding the above-described criminal counts before a jury.

7. Eades was convicted at the conclusion of the trial. At no time during the course of the trial was there held an instruction and verdict conference. The absence of an instruction and verdict conference prevented Eades from receiving a fair trial.

8. Eades' attorney in the criminal proceeding, Harry Hertel (hereinafter referred to as "Hertel"), requested a transcript for purposes of filing post-conviction motions at some time within

three months following Eades' conviction.

9. After Hertel requested a transcript for purposes of filing post-conviction motions, Sterlinske called his court reporter into his office and dictated a "certificate" in which he made certain representations as to what had occurred with respect to the instruction and verdict conference.

10. Upon information and belief, the above-described "certificate" materially misrepresented what actually occurred in the criminal proceedings. Sterlinske directed the court reporter to date the certificate as of the date of the trial, even though this was not the date on which it was prepared and signed. Moreover, Sterlinske directed the reporter to indicate in the certificate that a full-fledged instruction conference had taken place in

Sterlinske's chambers even though such a conference had not in fact occurred.

11. The certificate was stamped "Filed" with the Clerk's Stamp as of October 23, 1980, and the Court's docket sheet was changed to indicate that the certificate had been filed on that date, even though the document was filed on a much later date.

12. Upon information and belief, on some day after January 29, 1981, Sterlinske caused the aforementioned certificate to be stamped by the court reporter with the Clerk of Court's filing stamp, indicating that it had been placed in the court file on October 23, 1980, the original trial date.

13. Upon information and belief, on some day after January 29, 1981, Sterlinske caused the docket sheet record to be altered by the court reporter to

indicate that the afore-described certificate was filed on October 23, 1980, the original trial date.

14. Sterlinske falsified the certificate and caused it to be inserted in the record with the intention of misleading others regarding the proceedings at trial.

15. Upon information and belief, Sterlinske did not provide any of the parties to the criminal proceeding with notice of the insertion of the certificate in the record.

16. In a letter to Attorney Hertel, Sterlinske further attempted to persuade Hertel not to challenge the jury instructions and verdict. Sterlinske, in his communications to Attorney Hertel, represented that "the file in the matter indicates that there was a conference held between all of the attorneys, the

instructions were gone over carefully, and they were approved by both the district attorney and Mrs. Eades' counsel at that time." Said misrepresentation was fraudulent in nature and made with the intent to deceive the parties including counsel of record.

17. In his decision on post-conviction motions, Sterlinske, without reference to his certificate, falsely stated:

> Prior to the submission of the verdict and the charge to the jury, the clerk's minutes indicate that a conference was held in chambers, and the attorneys for the parties stipulated and agreed that the verdicts as submitted to the jury were approved by both and likewise there was no object to any of the instructions as proposed by the Court. This was accomplished at 3:43 p.m. after the closing of the testimony of the parties.

The Clerk's minutes did not indicate any of what the respondent purported that

they contained. Sterlinske denied Eades post-conviction motions.

18. Upon information and belief, Sterlinske engaged in the above-described actions so as to mislead the parties and appellate courts as to what had occurred at the trial.

19. The acts alleged above were done intentionally, willfully, wantonly, maliciously, and with reckless disregard of Eades' constitutional rights as protected under the Fourteenth Amendment and 42 U.S.C. 1983.

20. As a direct and proximate result of Sterlinske's acts as described above, Eades was unjustly required to serve a prison term of approximately two years.

PLAINTIFF'S CAUSE OF ACTION

21. That as and for a cause of action against the defendant Sterlinske under 42 U.S.C. 1983, the plaintiff Eades hereby realleges all of the paragraphs previously set forth in this complaint as if set forth fully herein.

22. The acts of Sterlinske as described above deprived Eades of life, liberty and property without due process of law, denied her equal protection of the laws, and abridged her privileges and immunities; all in violation of her constitutional rights as secured by the Fourteenth Amendment of the United States Constitution and 42 U.S.C. 1983.

23. That the actions engaged in by Sterlinske as described above were committed under the color of state law and in violation of Eades' rights under the Fourteenth Amendment and 42 U.S.C. 1983.

COMPENSATORY DAMAGES

24. As a direct and proximate result of the actions engaged in by Sterlinske as described above, Eades has suffered damages in the form of loss of wages, mental and physical distress, pain and suffering, humiliation, loss of reputation and diminished earning capacity and will continue to suffer said damages in the future.

PUNITIVE DAMAGES

25. That the course of conduct of Sterlinske as described above was deliberately undertaken and was committed in wanton, willful or reckless disregard of Eades' rights, and in view of the aggravating circumstances set forth above, was attended by malice and vindictiveness on the part of Sterlinske.

26. As a result of the course of conduct of Sterlinske, Eades is entitled to punitive damages.

WHEREFORE, plaintiff Eades demands:

(a) Trial by jury on all claims for relief.

(b) Back wages including interest.

(c) Compensatory damages in a sum sufficient to compensate Eades for her injuries.

(d) Punitive damages in an amount sufficient to punish Sterlinske and to deter others.

(e) Reasonable attorney's fees and costs and disbursements pursuant to 42 U.S.C. § 1988.

(f) Grant such other and further relief as the Court deems just and proper.

Dated this 3rd day of September, 1985.

Respectfully submitted,

MARGUERITE EADES, Plaintiff

By

FOX, FOX, SCHAEFER & GINGRAS, S.C.
Robert J. Gingras
44 E. Mifflin; Suite 305
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/s/ Robert J. Gingras
Robert J. Gingras

By
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Madison, WI 53703

/s/ Daniel G. Mathews (RJG)
Daniel G. Mathews

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARGUERITE EADES,
FIRST AMENDED COMPLAINT
Plaintiff,

-vs- Case No. 85-C-824-S

DONALD J. STERLINSKE,
BRADLEY W. HUFF, and
JULIE EWALD,

Defendants.

INTRODUCTION

NOW COMES the plaintiff, Marguerite Eades, by her attorneys Fox, Fox, Schaefer & Gingras, S.C., by Robert J. Gingras, and Brynelson, Herrick, Bucaida, Dorschel & Armstrong, by Steven J. Schooler, and as and for a complaint against the defendants Donald J. Sterlinske, Bradley W. Huff, and Julie Ewald, alleges as follows:

JURISDICTION AND VENUE

1. Jurisdiction is conferred on

this Court by 28 U.S.C. § 1343.

2. This claim may be venued in the Western District of Wisconsin pursuant to 28 U.S.C. § 1391 insofar as the plaintiff resides in this district, and the acts alleged as the basis for plaintiff's claim occurred within the boundaries of this district.

PARTIES

3. Plaintiff Marguerite Eades (hereinafter referred to as "Eades") is an adult resident of Wisconsin residing at Woodruff, Wisconsin.

4. The defendant Donald J. Sterlinske (hereinafter "Sterlinske") is an adult resident of Wisconsin residing at Route 1, Tony, Wisconsin and is a former judge of Rusk County.

5. The defendant Bradley W. Huff (hereinafter "Huff") is an adult resident

of Wisconsin residing at Ladysmith, Wisconsin.

6. Upon information and belief, the defendant Julie Ewald (hereinafter "Ewald") is an adult resident of Wisconsin, residing at 1002 Bruno Avenue, Ladysmith, Wisconsin.

GENERAL ALLEGATIONS

7. On or about June 16, 1980, Eades was charged criminally with two counts of welfare fraud by the State of Wisconsin in the Circuit Court for Rusk County.

8. Sterlinske held the title of circuit court judge throughout the course of the criminal proceedings against Eades.

9. Huff held the title of court reporter throughout the course of the criminal proceedings against Eades.

10. Ewald held the title of clerk (for Sterlinske) throughout the course of the criminal proceedings against Eades.

11. In approximately October of 1980, a trial was held regarding the above-described criminal counts before a jury.

12. Eades was represented by Allan Kenyon (hereinafter "Kenyon"), the city attorney for Ladysmith (county seat for Rusk County), during the trial. Eades was convicted at the conclusion of the trial. At no time during the course of the trial was there held a jury instruction and verdict conference (hereinafter "instruction and verdict conference). The absence of a jury instruction and verdict conference prevented Eades from receiving a fair trial.

13. After the trial, Harry Hertel (hereinafter "Hertel") replaced Kenyon as Eades' attorney in the criminal proceedings against her. Hertel requested a transcript for purposes of filing post-conviction motions at some time within three months following Eades' conviction.

14. After Hertel requested a transcript for purposes of filing post-conviction motions, Sterlinske called his court reporter Huff into his office and dictated a "certificate" in which he made certain representations as to what had occurred with respect to the instruction and verdict conference. (See Exhibit "A" attached hereto and incorporated herewith).

15. Upon information and belief, the above-described "certificate" materially misrepresented what actually

occurred in the criminal proceedings. Sterlinske directed Huff to date the certificate as of the date of the trial, even though this was not the date on which it was prepared and signed. Moreover, Sterlinske directed Huff to indicate in the certificate that a full-fledged instruction and verdict conference had taken place in Sterlinske's chambers even though such a conference had not in fact occurred. Finally, Sterlinske caused Huff to alter the trial transcript so that it would be consistent with its false certificate.

16. The certificate was stamped "Filed" with the Clerk's Stamp as of October 23, 1980, and the Court's docket sheet was changed to indicate that the certificate had been filed on that date, even though the document was filed on a much later date.

17. Upon information and belief, on some day after January 29, 1981, Sterlinske caused the aforementioned certificate to be stamped by Huff with the Clerk of Court's filing stamp, indicating that it had been placed in the court file on October 23, 1980, the original trial date, and placed in the court file.

18. Upon information and belief, on some day after January 29, 1981, Sterlinske caused Ewald to alter the docket sheet record to indicate that the afore-described certificate was filed on October 23, 1980, the original trial date, even though the certificate was filed on a much later date.

19. Sterlinske, Huff, and Ewald all knew that the certificate was false. The participation of each in the stamping of the certificate and the insertion of it

into the record was done with the intention of misleading others, including Eades and her counsel, regarding the proceedings at trial.

20. None of the defendants provided any of the parties to the criminal proceeding with notice of the insertion of the certificate in the record. Defendants did not provide said notice so as to mislead others, including Eades and her counsel, regarding the proceedings at trial.

21. After Hertel placed Sterlinske on notice that he intended to challenge the jury instructions, the jury verdict, and the instruction and verdict conference, Sterlinske further attempted to persuade Hertel not to challenge the jury instructions, jury verdict, and the instruction verdict conference. Sterlinske, in a letter to Attorney

Hertel of April 9, 1981, represented that "the file in the matter indicates that there was a conference held between all of the attorneys, the instructions were gone over carefully, and they were approved by both the district attorney and Mrs. Eades' counsel at that time." (See Exhibit "B" attached hereto and incorporated herewith). Said misrepresentation was fraudulent in nature and made with the intent to deceive the parties including counsel of record.

22. In his decision on post-conviction motions, Sterlinske, without reference to this certificate, falsely stated:

> Prior to the submission of the verdict and the charge to the jury, the clerk's minutes indicate that a conference was held in chambers, and the attorneys for the parties stipulated and agreed that the verdicts as submitted to the jury were approved by both and likewise there was no objection

> to any of the instructions as proposed by the Court. This was accomplished at 3:43 p.m. after the closing of the testimony of the parties.

The Clerk's minutes did not indicate any of what Sterlinske purported that they contained. Sterlinske denied Eades post-conviction motions.

23. Sterlinske sentenced Eades to two years in prison.

24. On or about April 30, 1981, Sterlinske communicated in writing to the Parole Board for the State Department of Health and Social Services (hereinafter "Board") regarding Marguerite Eades. One of the purposes of Sterlinske's letter (See Exhibit C attached hereto and incorporated herein) was to dissuade the board from granting Eades parole at her initial parole hearing.

In his letter, Sterlinske stated:

> It has been my policy not to express any feelings one way or

> the other when I receive notices of the initial parole hearing. I would, however, be rather interested in being apprised of this inmate's present attitude as it relates to the circumstances surrounding these offenses. It is usually inconsistent to accept full responsibility and acknowledge improper conduct for which an inmate may be incarcerated on one hand, and then proceed with alternate remedies in seeking an appeal which at least seems to indicate an unwillingness to accept or recognize and acknowledge improper conduct. (Emphasis supplied).

In writing this letter, Sterlinske was also attempting to dissuade Eades from pursuing her appeal so that his criminal misconduct would not be discovered during her appeal.

25. Eades' request for parole was denied at her initial parole hearing. Eades served nine months in prison. Eades was in prison from December 16, 1980 to approximately September 6, 1981.

26. Upon information and belief, Sterlinske engaged in the actions described in paragraphs 21 and 22 so as to mislead the parties and appellate courts as to what had occurred at the trial.

27. The acts of Sterlinske as described in paragraphs 14 through 22 and 24 above constitute illegal acts in violation of Wis. Stats. 946.72(1) (tampering with public records is a Class D felony), and Wis. Stats. 946.12 (misconduct in public office includes intentionally refusing to perform a nondiscretionary ministerial duty, does an act in excess of lawful authority or which he knows is forbidden by law, or in his official capacity as officer or employee, makes an entry in which a material respect is intentionally falsified) and also constitute non-

judicial acts occurring outside Sterlinske's jurisdictional authority and absolute immunity as judge.

28. At times relevant hereto, defendants engaged in a pattern and practice of fraudulently altering court records in legal cases other than the criminal proceedings regarding Eades as described above.

29. As a result of the fraudulent actions of defendants as described in paragraphs 14 through 22, 24 and 27-28, Eades did not obtain knowledge of said actions until a short time after February 11, 1985, when she received a letter from James E. Doyle, Jr. in his capacity as attorney for the Judicial Commission for the State of Wisconsin. (See Exhibit "D" attached hereto and incorporated herewith).

PLAINTIFF'S FIRST CAUSE OF ACTION

30. That as and for a cause of action against the defendants Sterlinske, Huff and Ewald, under 42 U.S.C. § 1983, the plaintiff Eades hereby realleges all of the paragraphs previously set forth in this complaint as if set forth fully herein.

31. The acts of Sterlinske, Huff and Ewald, as described above, deprived Eades of liberty without due process of law, and denied her the equal protection of the laws, all in violation of her constitutional rights as secured by the Fourteenth Amendment of the United States Constitution.

32. That the actions engaged in by Sterlinske, Huff and Ewald, as described above, were committed under the color of state law and in violation of Eades' rights under the Fourteenth Amendment of

the United States Constitution as described in paragraph 31.

33. That the actions engaged in by Sterlinske, Huff and Ewald, as described above, directly and proximately caused Eades to incur and suffer those damages as described in paragraph 45 below.

PLAINTIFF'S SECOND CAUSE OF ACTION

34. That as and for a second cause of action against defendants Sterlinske, Huff, and Ewald, under 42 U.S.C. § 1983, the plaintiff Eades hereby realleges all of the paragraphs previously set forth in this complaint as if set forth fully herein.

35. The acts of Sterlinske, Huff and Ewald, as described above, deprived Eades of her right to a fair trial, a fair and impartial jury trial, effective assistance of counsel, a fair and

impartial judge, and fair consideration of post-verdict motions and appeal based upon an accurate record, contrary to those due process guarantees as secured by the Sixth and Fourteenth Amendments of the United States Constitution.

36. The actions engaged in by Sterlinske, Huff and Ewald, as described above, in violation of Eades' rights under the Sixth and Fourteenth Amendments of the United States Constitution, were committed under color of state law.

37. That the actions engaged in by Sterlinske, Huff and Ewald, as describe above, directly and proximately caused Eades to incur and suffer those damages as described in paragraph 45 below.

PLAINTIFF'S THIRD CAUSE OF ACTION

38. That as and for a cause of action for civil conspiracy against

defendants Sterlinske, Huff and Ewald, the plaintiff Eades hereby realleges all of the paragraphs previously set forth in this complaint as if set forth fully herein.

39. That this cause of action for civil conspiracy is a state law claim brought pendent to plaintiff's federal causes of action as described above.

40. That the defendants Sterlinske, Huff, and Ewald, agreed to, actually formed and operated a conspiracy to deprive Eades of her due process, liberty, fair trial and appellate rights by engaging in those wrongful and illegal acts as described in paragraphs 14 through 22, 24 and 27-28.

41. That each of the defendants Sterlinske, Huff and Ewald, acted and participated knowingly in the furtherance

of their conspiracy as described in paragraphs 14 through 22, 24 and 27-28.

42. That each of the defendants Sterlinske, Huff, and Ewald, were aware of, acquiesced, and assented to the illegal actions and scheme as described above in paragraphs 14 through 22, 24 and 27-28.

43. That the defendants Sterlinske, Huff, and Ewald had a unity of purpose or common design in understanding, or a meeting of the minds, as to those unlawful acts as described above in paragraphs 14 through 22, 24 and 27-28.

44. That the civil conspiracy of defendants Sterlinske, Huff, and Ewald, as described above in paragraphs 14 through 22, 24 and 27-28 and 40 through 43 caused damage to Eades as described in paragraph 45 below.

COMPENSATORY DAMAGES

45. As a direct and proximate result of the actions engaged in by defendants as described above, Eades has suffered damages in the form of loss of wages, mental and physical distress, pain and suffering, humiliation, loss of reputation and diminished earning capacity and will continue to suffer said damages in the future.

PUNITIVE DAMAGES

46. That the course of conduct of defendants as described above was deliberately undertaken and was committed in wanton, willful or reckless disregard of Eades' rights, and in view of the aggravating circumstances set forth above, was attended by malice and vindictiveness on the part of defendants.

47. As a result of the course of conduct of defendants, Eades is entitled to punitive damages.

WHEREFORE, plaintiff Eades demands:

(a) Trial by jury on all claims for relief.

(b) Back wages including interest.

(c) Compensatory damages in the sum of $1,000,000.00.

(d) Punitive damages in the amount of $1,000,000.00.

(e) Reasonable attorneys' fees and costs and disbursements pursuant to 42 U.S.C. § 1988.

(f) Grant such other and further relief as the Court deems just and proper.

Dated this 9th day of January, 1986.

Respectfully submitted,

MARGUERITE EADES, Plaintiff

By

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Steven J. Schooler

STATE OF WISCONSIN CIRCUIT COURT — RUSK COURT

STATE OF WISCONSIN,

PLAINTIFF,

VS. D E C I S I O N

MARGUERITE EADES, CASE NO. 80 CR 82

DEFENDANT.

Post conviction motions were filed on behalf of the Defendant by her substituted Attorney Harry Hertel.

On June 16, 1980, upon complaint of William Volkman, the Defendant Marguerite Eades was charged with two (2) counts of welfare fraud. One, securing food stamps for the month of October of 1979, from both Rusk County and Oneida County, such act being prohibited by law. As a second count the Defendant was charged from the period of October 22, 1979, thru June 30th, of 1980, of receiving AFDC and

public assistance through the Rusk County Department of Social Services in addition to medical assistance in excess of $250.00, and it is alleged that the Defendant was ineligible for such aid due to the fact that the Defendant's husband was not in fact an absent spouse under the qualifying prerequisites of the AFDC program.

It appears that the Defendant Marguerite Eades was previously living outside of Rusk County, and on or about October 22, 1979, moved a house trailer into the Bruce area, and she immediately made application for both food stamps for the month of October 1979, and also for aid alleging that she and her husband were separated and not living together. The Defendant's husband at that time was working for Sedlak Garage in Minocqua, Wisconsin, and it was alleged by the

department that he resided with Marguerite Eades in a house trailer in the Bruce area on weekends.

At the time of the application for aid the Defendant stated that she had been living in Vilas County, and was living on support from her husband, but it appears that she made application and did in fact receive food stamps from Oneida County during the month of October. She likewise on October 22 made application for food stamps and aid in Rusk County, and on November 2, received her first check in the amount of $896.00 representing $348.00 for the prorated month of October, and $548.00 for the month of November. Thereafter, she continued to receive such sum for herself and her minor children in the sum of $548.00 totalling gross payments in the

amount of basic aid in the amount of $4,732.00.

On or about June 30th when the Rusk County Department of Social Services discovered that Mr. Eades was in fact living with the family unit and that there was a duplicate application for food stamps during the month of October of 1979, they commenced an action for welfare fraud and the Defendant and her family thereafter moved out of the Rusk County area and withdrew from further assistance.

The testimony offered at the time of trial indicates that the Bruce Postmaster testified that Mr. Eades was in fact authorized to receive mail at the trailer at the Bruce address.

Betty Jenness of the Rusk County Department of Social Services testified that she had prepared the checks for the

Defendant, and examined the signatures and testified that the Defendant had received and in fact cashed the checks involved.

The Rusk County Treasurer identified the checks paid to the Defendant in the form of aid, and Jack Phillips of the Oneida County Department of Social Services testified that according to the Oneida County records Mrs. Eades did in fact receive food stamps from Oneida County for the month of October of 1979. He testified further that he made an attempt to locate Mr. Eades and found that he had no known address, and during the time that he was employed in Rhinelander was living out of a truck.

Loraine Flohr of the Rusk County Department of Social Services testified and identified the application and checks for food stamps received by the Defendant

for the month of October, 1979. She further testified that in the event that Mrs. Eades' husband did in fact reside with the family as a family unit he was not an absent spouse and Mrs. Eades was not, therefore, entitled to receive the aid to which she had applied. She testified further that in the event Mrs. Eades was separated from her husband she would then be eligible.

William Volkman the complainant and the investigator for the Rusk County Department of Social Services indicated that he had investigated the complaint of welfare fraud, and found that the trailer was registered in the name of Dale Eades Sr., and his wife the Defendant Marguerite Eades. He further discovered that Mrs. Eades in fact had received food stamps for the month of October of 1979, both from the Oneida County Department of

Social Services, and the Rusk County Department of Social Services, and that the electricity, trailer rent, and utilities were in the name of Dale Eades. He further testified that he had contacted Mrs. Eades the Defendant regarding the improper food stamps and the total number of vehicles inasmuch as the regulations at that time prohibited the owning of more than one motor vehicle. Mrs. Eades failed to give an adequate explanation for having made application for double food stamps, and that Mrs. Eades maintained that her husband wasn't living with her in Bruce. His further investigation indicated that the gas and the electrical connections were in the name of Dale Eades, and applied for on October 13, 1979, and that Dale Eades Sr., signed the lease for the trailer lot rental. The

certificate of title to the home indicates that the trailer home was jointly held between Dale Eades and his wife.

Dale Eades Sr., was sworn and stated that he was living with his wife at that time in the Minocqua area and having moved there either July 9th or 10th of 1980. He testified that he lived out of his truck most of the time and slept in his automobile, and that he was paying child support on a prior temporary order to the Vilas County Clerk of Court. He admitted that he signed the lease agreement and that he knew that his children were on welfare, and that he was attempting to reconcile with his wife. He further testified that he had prior difficulty that he was an alcoholic and that he and his wife had considerable financial difficulties since their

marriage. He testified further on cross examination that he was living in a hotel, however, he was unable to keep up with his expenses at that time and he then reverted to living out of his automobile. He admitted regularly visiting his family in Bruce, and he testified that the Defendant had 13 children six (6) of which were his, and that as of June 30th he moved to Minocqua and he had the support order in Vilas County removed, and that he resumed living with his wife in the Minocqua area.

Jean Freeberg the Parkview Trailer Court manager indicated that while the trailer was located in Rusk County that Mr. Eades had in fact signed the lease for the trailer space, and that he was responsible for the rent. She testified that she saw Mr. Eades in the area after

the parties moved in and that he became a more frequent visitor on weekends. She further testified that she assumed at the time the parties rented the trailer space that she assumed and took for granted that Mr. Eades was in fact going to live in the trailer with his wife.

Mr. Robert Madsen the manager of Lake Superior District Power Company stated that no official application was made, however, that the electricity was in the name of Dale Eades with trailer park Lot No. 19, and that it was placed in the name of Dale Eades and that the account was delinquent.

Leona Winter of the Wisconsin Gas Company stated that a meter order was made out in the name of Dale Eades on October 17, 1979, and that throughout the entire time that the trailer was parked

in the Bruce area the gas service was in the name of Dale Eades.

Donald Sedlak the owner of the Minocqua garage for whom Mr. Eades was employed testified that he never gave Dale permission to sleep there, however, on several occasions he did see him in and around the garage after working hours. He stated that he had no prohibition against him staying there but that he never checked up nor did Mr. Eades at anytime ever had his permission to stay over-night in the garage.

Officer Terry Erdman of the Ladysmith Police Department testified that on the 11th of April, 1980, he had stopped and talked to Dale Eades and that he had stopped him at about 5:00 A.M. on a Friday morning. Officer Erdman testified that Mr. Eades advised him that he was living in the trailer Court in

Bruce, and that he was on his way back to Minocqua, and that he had been there because his daughter had run away. Officer Erdman indicated that he gave Mr. Eades a warning and issued no traffic citation. On an additional occasion Mr. Erdman also stated that he had talked to Mr. Eades relating to a stolen bicycle, and that Mr. Eades gave his address as the trailer court in Bruce, Wisconsin.

Deputy Sheriff Gary Hawkins testified that on April 20th he was at the trailer house and that he talked to two(2) of the Eades children who advised him that their father was at home sleeping, and that Deputy Hawkins observed Mr. Eades within the trailer itself. He further testified that on April 26th he stopped a hitchhiker who was William Eades one of the minor children of the parties, who stated that

he was hitchhiking to Minocqua, and he further stated that he lived in Bruce with his father and that he came back on weekends, and he stated at that time that his father wasn't going back that weekend and, therefore, he had to hitchhike to get back to the Minocqua area.

Phyllis Podolak, a daughter of the Defendant, testified that she made the initial $50.00 deposit on the trailer, and that she was responsible for the selection of the area in which the trailer was placed.

Thereafter, Marguerite Eades testified that she was presently living in the Minocqua Trailer Court, that she had lived at Bruce, and she testified that she had been married since 1963, and that she had been separated on occasion and that she and her husband had not lived together for a long while. She

testified that she had been living in an old dilapidated house and the house was repossessed and she had to look for a place to rent and that one of her sons borrowed some money for the down payment on the trailer, and that she and her husband had the trailer placed in their names and they signed the initial mortgage at the time of its purchase. She further testified that her daughter placed the trailer lot in Dale Seniors name, and that the application was in her handwriting.

During the course of the trial the Plaintiff the State of Wisconsin was represented by Michael J. Devanie the Rusk County District Attorney, and the Defendant was represented through the Public Defender's Office by local counsel Attorney Allen Kenyon.

Prior to the submission of the verdict and the charge to the jury, the Clerk's minutes indicate that a conference was held in chambers, and that the parties and the attorneys for the parties stipulated and agreed that the verdicts as submitted to the jury was approved by both, and likewise there was no objection to any of the instructions as proposed by the Court. This was accomplished at 3:43 P.M. after the closing of the testimony of the parties. Thereafter, closing arguments were had, instructions to the jury were given, and the jury deliberated. Thereafter, a verdict of guilty to both counts was received in open Court with the Defendant, her counsel, and the district attorney being present.

The Defendant was released on bond and a pre-sentence investigation was

requested. The verdict was accepted, and the Defendant permitted to remain on bond until sentencing. After the pre-sentence investigation was received sentencing was set for December 9, 1980. After hearing arguments of the parties, and the Defendant having been given an opportunity to be heard, sentence was imposed to an indeterminate term of not more than two(2) years on the AFDC fraud, and one year concurrent on the food stamp fraud. Commitment was stayed for seven(7) days until December 16, 1980, to permit the Defendant to arrange for the care and support of her minor children pending her incarceration. Thereafter, she entered the institution on December 16th and remained there until this date.

Attorney Kenyon on behalf of the Defendant filed a request which was heard on December 16th requesting that the

Defendant be released on bond pending the filing of an appeal. This motion was denied for lack of merit. Thereafter and prior to any substitution of counsel, the Defendant's present attorney requested transcripts on January 16th, although no substitution of counsel was filed nor consent given by the Defendant's attorney of record. Thereafter, the transcripts have been filed and a number of motions set for hearing.

Duplicate motions for the release of the Defendant pending appeal was filed, heard, and denied on May 13, 1981, for the reason that no merit was shown for such request. A number of additional motions were filed and heard on May 22, 1981, and the original post conviction motions were filed March 26th although as of that time the Defendant's petitioning attorney was not the attorney of record

for this Defendant, and a considerable period of time elapsed prior to the securing of a substitution, and his appearance being authorized by the attorney and counsel who appeared at the trial of the matter and the State Public Defender's Office.

Thereafter on the 22nd of May the Defendant through her counsel filed a number of motions. Prior to that time counsel requested that the Defendant be released on a Writ of Habeas Corpus Ad Testificandum which request was denied for the reason that there was no showing that the Defendant's presence was required.

At the time of the hearing of the post-conviction motions request for a new trial was made basically on the allegation that errors were made at the trial, and that the jury instructions

were defective. There is no showing of any specific prejudicial error to the Defendant as it relates to the admission of the testimony at the time of the trial, and no showing of any ruling by the Court which was made upon any objection by either party. Likewise, counsel for both the State and the Defendant appeared prior to the argument to the jury and consented to the verdicts in the form and style in which it was prepared as well as the instructions that were prepared by the Court. The parties further stipulated that it would not be necessary to furnish written instructions to the jury, although they had been prepared in advance and were available. In accordance with the stipulation of the parties the Court approved the agreement, presented the verdict as agreed by the parties as well as the instructions which

were offered. The Defendant's request for a new trial on that basis is specifically denied.

The request for a new trial be granted on the basis of insufficient evidence is completely without merit. It was the Defendant's contention throughout the entire trial that she was not guilty of the welfare fraud count as it relates to the AFDC assistance, and an examination of the testimony indicates that there is ample testimony and credible testimony which the jury could have believed to substantiate its findings of a verdict of guilty. All of the circumstances surrounding the placing of the trailer in Rusk County in the name of the Defendant, the signing of the lease by the Defendant and her husband are items which well could have been considered by the jury and substantiate

its findings that the Defendant's husband was not in fact an absent spouse and that, therefore, the assistance granted was fraudulently received.

The allegation that the food stamp count was a misdemeanor, while perhaps erroneously referred to in some stages of the record as a misdemeanor carried with it a maximum term of one year with no place of imprisonment having been prescribed by statute. The preliminary examination related to the circumstances surrounding the granting of this aid, and the information as charged also charges the Defendant with this count, and the Defendant in no way was prejudiced as to whether or not the matter was tried as a misdemeanor or as a felony, and there is no substantive error indicated. Accordingly, the request for a new trial on that basis is denied.

Allegations that the two(2) counts were multiplicitous and that the counts were continuous in nature is completely without merit. While the same application for assistance may be used to substantiate benefits under the AFDC program and food stamp program and the medical assistance program, the actual offenses and the circumstances surrounding their occurrence are completely different and there is nothing duplicitous about the offenses or the circumstances surrounding their commission.

The other allegations relating to the Defendant and her representation at the time of the trial is likewise without merit. Attorney Kenyon represented this Defendant throughout the entire stages of this trial. As a matter of fact the record is quite clear showing that the

Defendant at the time of the preliminary hearing appeared without counsel, and that the Court refused to permit her to proceed without counsel and a new hearing date was set and counsel was arranged for this Defendant through the Public Defender system she having been found to be indigent and qualified for the appointment of local counsel. It is most important that all Defendants receive adequate representation throughout all of the stages of the criminal proceedings, and all Courts are charged with the responsibility to insure that the Defendant's rights are in no way violated. Throughout the initial return, preliminary examination, and jury trial in this matter Attorney Kenyon represented this Defendant. The record indicates his appearances, the manner in which he conducted the defense of this

Defendant, and his vigorous cross-examination of all of the prosecution witnesses. It is highly inappropriate for a substituted attorney who was not present during the course of the proceedings to review a cold record and commence a criticism of a fellow attorney merely because the attorney representing the Defendant did not elect to make a number of meritless motions which did not apply to the Defendant, and likewise proceed step by step in a manner as indicated in the Public Defender's guide. Each case must be determined on its individual facts, and the Defendant must be assured of a fair and equitable hearing and all of her constitutional rights guaranteed to her. There is absolutely no scintilla showing here that the Defendant was in any way prejudiced or that she was denied the benefit of

adequate counsel. The fact that the jury did not in fact believe her or her husband's testimony is certainly not evidence of any errors in the course of the hearing or any inadequacy of counsel appointed for her. It is well recognized that there are many appropriate alternate ways of the trial of a criminal matter, and the mere fact that one attorney may not object to a specific question or respond as another attorney may feel objectionable, certainly in no way supports an allegation of inadequacy or incompetence of counsel. Likewise the failure to try any criminal matter in the same manner and method as one attorney may proceed as compared with another is likewise no indication that the Defendant was in any way deprived of fair and competent representation. The allegation that a number of superflous motions and

questionable objections were not in fact made certainly in no way negates the representation afforded to this Defendant. She was represented throughout the entire proceedings by adequate counsel and competent counsel. His method and manner in trying the matter was adequate, and there is absolutely no merit to any of the criticisms leveled against him by substituted counsel.

Accordingly, all of the Defendant's post-conviction motions made and heard prior to this time be and the same are hereby denied.

Dated this 22nd day of May, 1981.

BY THE COURT:

/s/ D. J. Sterlinske
D. J. Sterlinske,
Circuit Judge

87-37

Case No.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

MARGUERITE EADES, Petitioner,

-vs-

DONALD J. STERLINSKE, BRADLEY W. HUFF, and JULIE EWALD, Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT, JULIE EWALD, IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPLEMENTAL APPENDIX

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(715) 834-8101

Counsel for Respondent

May 26, 1987

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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SUPPLEMENTAL STATEMENT OF THE CASE

The respondent, Julie Ewald (hereinafter "respondent", the remaining respondents being identified either by name or as "defendants") will hereby amplify the statement of the case of the Petitioner in her Brief.

At page 3, petitioner asserts that she was imprisoned for nine (9) months "as a result of the unconstitutional acts of the defendants". However, the facts pled and accepted as true by the District Court are to the effect that "on some day after January 29, 1981," the respondent was directed to alter the docket record. (App., p. A-21). Further, that the petitioner was sentenced to two (2) years in prison and that her term commenced on December 16, 1980. (App., p. A-21). Clearly, the act alleged of the respondent took place subsequent to petitioner's incarceration.

At page 7, petitioner posits

that no Order requiring alteration of the record was filed. Nonetheless, on the face of the First Amended Complaint, the District Court found that Judge Sterlinske "caused his Clerk, Ewald, to alter the docket sheet record." (App., p. A-21).

Petitioner also asserts at pages 7-8 the participation by the respondent and the other defendants in "a scheme which fabricated and falsely altered a criminal trial record and transcript." Instead, that portion of the First Amended Complaint which contained a cause of action in conspiracy, was voluntarily disposed of by the petitioner at the District Court level. (Supp. App., p. SA-20, 21). In the absence of alleged acts of the respondent in conjunction with other defendants, use of the term "scheme" is inflammatory and an improper characterization of what is sought to be placed before this Court relative to the

respondent.

Finally, references are made at page 8 of the Petitioner's Brief to "the conduct" as being "shocking", "disgusting" and reprehensible". The petitioner would imply that these observations of the lower courts obtain with respect to the conduct of each of the three respondents. They did not, however. These forms of commentary have application solely with respect to the alleged conduct of Judge Donald J. Sterlinske. (App., p. A-5, p. A-16).

SUMMARY OF ARGUMENT

Respondent Ewald argues that the Court of Appeals did not conclude that her alleged act was ministerial. Further, the State Court for which she worked had jurisdiction over the petitioner's criminal case and that as to its presiding Judge, he acted toward petitioner in a judicial capacity and carried out judicial acts, thus entitling

him to judicial immunity. She also argues that she was directed by the Judge to act in the manner alleged and that the absence of an official Court Order to this effect does not defeat immunity for her. Respondent further contends that either derivative of the judicial immunity of the said Court or on a self-standing basis, as to the act alleged of her, she is entitled to judicial immunity because of the integral relationship between her performance of her discretionary act and the functioning of the Court. In this respect, her argument is that she is entitled to judicial or quasi-judicial immunity and that qualified immunity or some other form of immunity should not be applied.

Respondent argues additionally that there is not a real and embarrassing split of authority among the Circuits as to the extension of immunity to subordinate court employees, such as

herself, and that upon the facts alleged, this case is not an appropriate vehicle for establishment of a rule of nationwide impact on the doctrine of judicial immunity.

I. GENERAL REASONS FOR DENIAL OF THE WRIT OF CERTIORARI.

In accord with the law developed by this Court, special and important reasons must exist in order to support the granting of a Writ of Certiorari. Rice v. Sioux City Cemetary, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1954). Something more than an episodic or academic problem must be presented and the Court sees as its responsibility the duty to avoid deciding constitutional issues "unless avoidance becomes evasion." Further, as is set forth in Layne & Bowler Corporation v. Western Well Works, Inc., 261 U.S. 387, 67 L.Ed. 712, 43 S.Ct. 458 (1923), the rule is that this Court should be consistent in

refusing to grant such Writs except in instances where principles are involved which should be settled in the interest of the public at large and where there is a "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal."

It is believed by the respondent[1] that the issue of judicial immunity and the breadth of that doctrine have been firmly established by this Court in a line of decisions culminating in Stump v. Sparkman, 435 U.S. 349, 55 L.Ed.2d 331, 98 S.Ct. 1099 (1978). For the Court to grant Certiorari would be to second guess the mixed question of fact and law answered by the Court of Appeals below. It would neither establish a principle of law of general interest to the citizenry of the United States of

[1]The respondents Judge, Donald J. Sterlinske and Bradley W. Huff, being represented by counsel, respondent Ewald will pertain her arguments to her position.

America, nor resolve a real and embarrassing conflict among the circuits. Instead, it would merely resolve a grievance which the petitioner, personally, has with the broad application of judicial immunity.

Ms. Ewald would generally submit that Certiorari should not be granted. Her bases for so arguing are two-fold in nature:

(1) That while there exists a split of authority among the Circuits in application of judicial or derivative immunity to Clerks of Court, it is not an "embarrassing conflict."

(2) That as based upon the petitioner's claim that the respondent's act deprived her of Constitutional rights to liberty, effective assistance of counsel and a fair trial in a criminal proceeding, factually this case does not lend itself to an orderly and progressive development of Constitutional law. This

is argued because the alleged act of the respondent took place long after the trial and incarceration of the petitioner at a time, nonetheless, when disposition of post-trial motions were yet subject to respondent Judge Sterlinske's review and determination, over which process she exercised no control. (App., p. A-15, 16).

Finally, respondent would contend that the petitioner's characterization of her alleged act as being ministerial (Petitioner's Brief, p. 13) is inappropriate, and that upon this critical foundation the petitioner erroneously argues that there is a substantial division of authority among the Circuits.

II. THE COURT OF APPEALS DECISION DOES NOT DEVIATE FROM PRECEDENCE REQUIRING THAT IN ORDER FOR JUDICIAL IMMUNITY TO APPLY, A JUDICIAL ACT OR ACTS SHALL HAVE BEEN TAKEN.

The petitioner argues that the lower court decisions in this case

abrogate the "judicial act" requirement implicit in decisions granting judicial immunity. Ergo, in the absence of a judicial act ascribed to the defendant, Sterlinske, her further argument is that, whether standing alone or derived from the Judge, no immunity should flow to the respondent. The respondent contends that the Court of Appeals did decide that a judicial act or acts had taken place. Just as the ultimate doctrine of judicial immunity is to be broadly applied on the merits, so, too, is the concept of what constitutes a judicial act to be broadly construed. Bradley v. Fisher, 80 U.S. 335, 20 L.Ed. 646 (1872), holds that unless there is a complete absence of all jurisdiction, immunity for acts engaged in shall be afforded. Therein, the Court states:

> "But, if on the other hand, a Judge with general criminal jurisdiction over offenses committed within a certain District, should hold a

> particular act to be a public offense, which is not by the law made an offense and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the Judge, although these acts would be in excess of his jurisdiction, or of the jurisdiction of the Court held by him, for these are particulars for his judicial consideration, wherever his general jurisdiction over the subject matter is invoked." 20 L.Ed. at 651.

Where a Judge erroneously or improperly exercises his jurisdiction, where he acts with malice or in a corrupt fashion, as long as there is a scintilla of subject matter jurisdiction, judicial immunity will be afforded. Society and the citizenry of the judicial district in question are protected against corrupt, malicious, vindictive judges and their "shocking", "disgusting" and "reprehensible" acts by the processes of impeachment and removal from office.

To restrictively apply the requirement of "judicial act" would require that this Court artificially set standards so as to ascertain, interpret and condition those acts which are immune from those which are not, for the generally worded constitutional provisions, state statutes and applicable common law, if any, do not with any precision establish standards against which and within whose limits each and every Judge in a given jurisdiction is to perform in response to a specific application of fact and law in order to qualify for immunity. To do so, it is argued, would be to hamstring the judiciary.

The respondent further believes that Bradley v. Fisher, supra., is instructive relative to the concept of what constitutes the division point between a total lack of jurisdiction and jurisdiction for purposes of application

of judicial immunity. As is stated therein at Lawyers Edition, page 651,:

> "Indeed, some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the Court held by him, or the manner in which the jurisdiction shall be exercised. And the same purpose of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject matter and person, applies in cases of this kind, and for the same reasons."

The District Court held that jurisdiction was evident. (App., p. A-12).

The petitioner has alleged that after trial but before the hearing of certain post-trial motions, the defendant Judge falsified a Court record, that he directed his reporter to backdate it, stamp it with the date of trial and that he further caused the respondent to erroneously record in the docket sheet that said document had been filed on the date of trial. (Supp.App., p. SA-3 to 7).

As alleged by the petitioner, did Judge Sterlinske engage in commission of a grave procedural error? Yes. Did he act on an ex parte basis? Yes. Did he fail to see to it that the petitioner's rights and interest were protected? Clearly, yes. Did he act Qua Judge? Yes. Did the petitioner have the expectation at the time his alleged acts were committed that he was acting toward her in a judicial capacity? Yes. Did his Court have jurisdiction? Yes. Stump v. Sparkman, supra., would grant to him immunity under this set of circumstances.

Petitioner would also argue that because the functions of "preparation, preservation and maintenance of the transcript . . . and the record are duties normally performed by court reporters and clerks", defendant Sterlinske's acts, as above described, cannot constitute judicial acts

(Petitioner's Brief, pp. 20-21). This would appear to have been answered to the contrary in the Stump decision where at footnote [11] on page 362, Justice White comments:

> "Even if it is assumed that in a lifetime of judging, a Judge has acted on only one petition of a particular kind, this would not indicate that his function in entertaining and acting on it is not the kind of function that a Judge normally performs."

The petitioner cites ex parte Virginia 100 U.S. 339, 25 L.Ed. 676 (1879), in further support of her argument in this respect. The key to this decision is that this court therein considered, as regarding a Judge's act in automatically excluding black persons from jury duty, that the said act involved no discretion at all and that it was purely ministerial.

Sec. 753.03, Wis. Stats., (1979-80), and Article VII, Sec. 8, Wisconsin Constitution, broadly establish the powers of the Circuit Courts in

Wisconsin. The petitioner does not assert that Judge Sterlinske and his Court -- the Circuit Court for Rusk County -- lacked subject matter jurisdiction. Instead, she would contend that since the acts alleged took place after the trial was concluded, his Court and, thus, he as Judge, no longer retained jurisdiction and, hence, she was was not at that time dealing with him in his judicial capacity. The petitioner makes this argument notwithstanding her further allegation that subsequent to the alleged acts, Sterlinske presided over post-trial motions filed on her behalf (Supp. App., p. SA-5 to 9).

Petitioner argues that what the Judge did is "normally performed by court reporters and clerks." (Petitioner's Brief, p. 21). Even assuming this to be the case in Wisconsin, the breadth of the Circuit Court's jurisdiction as set forth above validates the alleged acts as

judicial even if Sterlinske never before and never after performed the acts alleged. Clearly, he dictated the certificate and directed the reporter and Clerk to act in furtherance of his perceived duties as Judge presiding over the petitioner's criminal case.

The petitioner would further characterize these acts as being ministerial in nature. To the contrary, in order for this to have been the case, Judge Sterlinske and, correspondingly, the respondents, Ewald and Huff, would have had to have been acting in light of a specific statutory or other legal command with respect to which they would have been required to mechanically respond and act. As is set forth in Mississippi v. Johnson, 471 U.S., 475, 18 L.Ed. 437 (1867):

> "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department, by judicial process, is one in

> which nothing is left to discretion. It is a simple, definite duty, arising under conditions admitted or proved to exist, and imposed by law." 18 L.Ed. at 440.

Sterlinske's acts were in the nature of a discretionary exercise of control over the progress and documentation of a case properly before his Court. For purposes of argument, that he erred grievously in the exercise of his discretion and that, in the process, he violated rights of the petitioner does not take his acts out of the realm of subject matter jurisdiction, nor does it mystically redefine them as being ministerial in nature. In Lowe v. Letzinger, 772 F.2d 308 (7 Cir. 1985), the Court appears to have answered this concern. In ruling against the appellant's assertion that the defendant trial Judge was liable in damages for failure to have notified him of an Order dismissing the case against him, it being alleged that the Judge intentionally delayed notice, the Court stated:

"Assuming the Judge did undertake to control the disposition of his own Order he was still acting in his judicial role, exercising his discretion. His judicial involvement had not yet ended. Interference with giving notice cannot be classified as merely administrative so as to avoid the immunity defense; it is too much an integral part of the total judicial process, in contrast, for exemple, to the mere typing and posting of the notice by a Clerk which is a ministerial task. We hold then that like a Judge's decision as to when an Order should issue, his decision as to whether and how notice should be given is also immunized."

These loose, general allegations as to the Judge do not justify cutting back on judicial immunity and thereby put a judicial officer through the disruptive process of a trial. To label some part of the judicial process as administrative or ministerial and thereby encroach on the judicial defense of absolute immunity, as disturbing as the judicial conduct may be, cannot be permitted. . . . Ibid., p. 313. (Emphasis supplied).

The respondent respectfully submits that should the Court consider the application of judicial immunity to

court clerks to be derivative from the Judge, the Circuit Court for Rusk County having had jurisdiction over the petitioner's case and the Judge having dealt with the petitioner in his judicial capacity and, further, the acts alleged as violating her constitutional rights having been judicial acts upon application of the doctrine the respondent's act is clearly protected, as well.

In the alternative, it is posited that this Court has, on at least one occasion, issued a decision in which it alluded that clerks of court be afforded with judicial immunity. That decision is Barr v. Matteo, 360 U.S. 564, 3 L.Ed.2d 1434, 79 S.Ct. 1335 (1959), in which at p. 569, the Court stated:

> "This Court early held that Judges of Courts of superior or general authority are absolutely privileged as respect civil suits to recover for actions taken by them in the exercise of their judicial functions, irrespective of the motives with

> which those acts are alleged to have been performed, Bradley v. Fisher (U.S.), 13 Wall. 335, 20 L.Ed. 646, and that a like immunity extends to other officers of government whose duties are related to the judicial process. Yaselli v. Goff (CA 2 NY), 12 F.2d 396, 56 ALR 1239, Affd. per curium 275 U.S. 503, 72 L.Ed. 395, 48 S.Ct. 155, involving a Special Assistant to the Attorney General . . ." (Emphasis supplied).

Thus, this Court has spoken indirectly to the effect that judicial immunity flowing to courts will also extend to governmental officials or employees whose duties are interconnected with those of the Court. In this respect, the respondent respectfully submits that the Court take judicial notice, under Secs. 59.39, 59.395 and 753.03, Wis. Stats. (1979-80) of the interrelationship between the duties of the Clerk of Circuit Court in Wisconsin and the powers and functions of the Circuit Courts.

III. THE DECISION OF THE COURT OF APPEALS DID NOT EXTEND ABSOLUTE JUDICIAL IMMUNITY TO MINISTERIAL ACTS OF CLERKS OF COURT; THERE DOES NOT CURRENTLY EXIST A REAL AND EMBARRASSING CONFLICT OF AUTHORITY AMONG THE CIRCUITS; THE DECISION IS CONSISTENT WITH THE GENERAL TENETS OF JUDICIAL IMMUNITY.

The respondent will concede that the Supreme Court has never, per se, decided a case of application of judicial immunity to clerks of court; although, as argued above, it has in Barr v. Matteo, supra., tangentially approached this issue. The respondent does respectfully disagree with the petitioner's characterization that a "raging conflict" exists among the Circuits on this issue. (Petitioner's Brief, p. 26). In addition, she would submit that it appears as though this Court has had the same or similar question posed of it on prior occasions and has declined to either grant Certiorari or consider the merits. Scott v. Dixon, 720 F.2d 1542 (11 Cir. 1983), Reh. Den. 729 F.2d 1468,

Cert. Den. 469 U.S. 832, 83 L.Ed.2d 64, 105 S.Ct. 122 (1984); Martinez v. Winner, 548 F.Supp. 278 (D.Col. 1982), affirmed in part, reversed in part and remanded, 771 F.2d 424 (10 Cir. 1985) modified in part and Reh. Den. 778 F.2d 553 (10 Cir. 1985) Cert. Granted for limited purpose of considering question of mootness, remanded in 10th Circuit, ___ U.S. ___, 90 L.Ed.2d 333, 106 S.Ct. 1787 (1986), case mooted, 800 F.2d 230 (10 Cir. 1986). [2]

Petitioner submits that the Court of Appeals concluded that the act alleged to have been committed by the respondent was a ministerial act and that the Court then engaged in "tortured reasoning" (Petitioner's Brief, p. 29), in rationalizing that she was acting discretionarily and, hence, was protected

[2] See also cases below cited for situations in which writs of certiorari have not been granted.

by judicial immunity. Instead, the Court of Appeals expressly distinguished the respondent's act from the ministerial act of the clerk of court considered in Lowe v. Letzinger, supra. (Concealment of an entry of an Order from the defendant). The Circuit Court of Appeals in the case before this Court concluded that the insertion of an entry into the docket record by the respondent of a falsehood was performed by her within the scope of her duties and that she performed discretionarily in this respect. (App. p. A-6). Therefore, the Court, upon the basis of three premises granted to her judicial immunity:

(1) She was acting in the discharge of her official duties;

(2) Judicial immunity is to be afforded to court officials acting with respect to criminal proceedings; and

(3) Her action was integrally related to the judicial process.

Upon the basis that the Court of Appeals did not conclude that the respondent was acting ministerially, the respondent would raise the following arguments.

Contrary to the petitioner's characterization that a "raging" conflict exists among the Circuits, as to the question of immunity for clerks of court and other court personnel, the respondent would submit that two of the eleven Circuits have not touched upon this subject (Circuits 10 and 11) and that of the remaining nine Circuits, they may be placed in the following categories:

(1) Blanket grant of judicial immunity or quasi-judicial immunity: Circuits 1, 3 and 9. Slotnick v. Staviskey, 560 F.2d 31 (1 Cir. 1977), Cert. Den. 434 U.S. 1077, 55 L.Ed.2d 783, 98 S.Ct. 1268 (1978); Lockhart v. Hoenstine, 411 F.2d 455 (3 Cir. 1969), Cert. Den. 396 U.S. 941, 24 L.Ed.2d 244,

90 S.Ct. 378 (1969); Stewart v. Minnick, 409 F.2d 826 (9.Cir. 1969).

(2) A grant of qualified immunity only: Circuits 2 and 5. Green v. Maraio, 722 F.2d. 1013 (2 Cir. 1983); Tarter v. Hury, 646 F.2d 1010 (5 Cir. 1981).

(3) A grant of judicial immunity if performing a discretionary or judicial or quasi-judicial act: Circuit 7.[3] Henry v. Farmer City State Bank, 808 F.2d 1228 (7 Cir. 1986); Lowe v. Letzinger, supra.

(4) Direct conflict within a Circuit as to application of (1) or (2), above: Circuit 8. McLallen v. Henderson, 492 F.2d 1298 (8 Cir. 1974), and Holt v. Dunn, 741 F.2d 169 (8 Cir. 1984) [Qualified Immunity Grant]; Davis

[3]Circuits 4 and 8 may rule in this fashion, as is perceived upon a reading of their respective decisions in the following cases: McCray v. Maryland, infra.; McLallen v. Henderson, infra.

v. McAteer, 431 F.2d 81 (8 Cir. 1970) [Judicial Immunity].

As to the subordinate topic of personnel following Court Orders or directions, the Circuits have ruled as follows:

(1) Total immunity if the person was acting within his or her scope of authority and following directions of the Court: Circuit 3. Lockhart v. Hoenstine, supra.

(2) Qualified immunity: Circuits 2, 4, 6 and 8. Green v. Mario, supra.; McCray v. Maryland, 456 F.2d 1 (4 Cir. 1972); Smith v. Martin, 542 F.2d 688 (6 Cir. 1976); Holt v. Dunn, supra.

(3) A direct conflict within a Circuit as to application of (1) or (2): Circuit 5. Tarter v. Hury, supra. [Total immunity]; Rheuark v. Shaw, 628 F.2d 297 (5 Cir. 1980), Cert. Den. 450 U.S. 931, 67 L.Ed 2d 365, 101 S.Ct. 1392 (1981); and Slavin v. Curry, 574 F.2d 1256 (5

Cir. 1978) [Qualified Immunity].

(4) Qualified immunity if the person was acting within the scope of his or her authority and was following a directive of the Judge: Circuit 7. Lowe v. Letzinger, supra. Quasi-judicial immunity for acts in reliance upon a Court Order: Circuit 7. Henry v. Farmer City State Bank, supra.

Clearly, the 4th Circuit has ruled that no immunity will lie relative to a ministerial act in the absence of court directives or orders which were followed. McCray v. Maryland, supra.

The respondent submits, in reliance on Layne & Bowler Corporation v. Western Well Works, Inc., supra., that the above array of decisions does not indicate a real and embarrassing conflict of authority among the Circuits. Those Circuits holding for total immunity, relative to both ministerial or discretionary acts, have not recently

handed down decisions in this realm. The 7th Circuit, on the other hand, has gone from an across-the-board application of judicial immunity, Dieu v. Norton, 411 F.2d 761 (7 Cir. 1969), to a modified approach, as based upon consideration of distinct situations of fact and law. The respondent argues that the law concerning immunity of court officials, such as clerks of court, is progressing in an orderly fashion within the Circuits and that this Court should decline to grant Certiorari upon this basis.

Contrary to petitioner's contention, the Court of Appeals decision is not inconsistent with case law construing the application of judicial immunity. Consistent with the decision of Barr v. Matteo, supra., the facts as alleged and deemed to be true by the lower Court clearly establish that the respondent was acting pursuant to a directive of the Judge of a court of

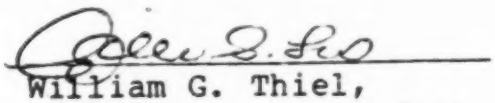
general jurisdiction over criminal matters in the petitioner's case. The Judge caused or directed her to perform the act alleged to have been in violation of the petitioner's Constitutional rights. (App., p. A-21). When coupled with the further argument that the Court of Appeals did not conclude that the respondent had engaged in a ministerial act, it is posited by the respondent that should this Court deem it appropriate to review the nature of the type and extent of immunity to be afforded to subordinate court personnel, neither is the instant case, either on the facts or as to the law applied by the lower court, appropriate for the prospective establishment of tenet of Constitutional law of national application.

CONCLUSION

The respondent, Julie Ewald, respectfully submits and contends that

this Court should refuse to grant the petitioner's Writ of Certiorari.

Respectfully submitted,



William G. Thiel,
Counsel for Respondent,
Julie Ewald.

INDEX TO SUPPLEMENTAL APPENDIX
BRIEF OF RESPONDENT
JULIE EWALD

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

MARGUERITE EADES,

Plaintiff,

FIRST AMENDED COMPLAINT

-vs-

Case No. 85-C-824-S

DONALD J. STERLINSKE, BRADLEY W. HUFF, and JULIE EWALD,

Defendants.

Now comes the plaintiff, Marguerite Eades, by her attorneys, Fox, Fox, Schaefer & Gingras, S.C., by Robert J. Gingras, and Brynelson, Herrick, Bucaida, Dorschel & Armstrong, by Steven J. Schooler, and as and for a complaint against the defendants Donald J. Sterlinske, Bradley W. Huff, and Julie Ewald, alleges as follows:

JURISDICTION AND VENUE

1. Jurisdiction is conferred on this Court by 28 U.S.C., Sec. 1343.

2. This claim may be venued in the Western District of Wisconsin

pursuant to 28 U.S.C., Sec. 1391 insofar as the plaintiff resides in this district, and the acts alleged as the basis for plaintiff's claim occurred within the boundaries of this district.

PARTIES

3. Plaintiff Marguerite Eades (hereinafter referred to as "Eades") is an adult resident of Wisconsin residing at Woodruff, Wisconsin.

4. The defendant Donald J. Sterlinske (hereinafter "Sterlinske") is an adult resident of Wisconsin residing at Route 1, Tony, Wisconsin, and is a former judge of Rusk County.

5. The defendant Bradley W. Huff (hereinafter "Huff") is an adult resident of Wisconsin residing at Ladysmith, Wisconsin.

6. Upon information and belief, the defendant Julie Ewald (hereinafter "Ewald") is an adult resident of Wisconsin, residing at 1002 Bruno Avenue,

Ladysmith, Wisconsin.

GENERAL ALLEGATIONS

7. On or about June 16, 1980, Eades was charged criminally with two counts of welfare fraud by the State of Wisconsin in the Circuit Court for Rusk County.

8. Sterlinske held the title of circuit court judge throughout the course of the criminal proceedings against Eades.

9. Huff held the title of court reporter throughout the course of the criminal proceedings against Eades.

10. Ewald held the title of clerk (for Sterlinske) throughout the course of the criminal proceedings against Eades.

11. In approximately October of 1980, a trial was held regarding the above-described criminal counts before a jury.

12. Eades was represented by

Allan Kenyon (hereinafter "Kenyon"), the city attorney for Ladysmith (County seat for Rusk County), during the trial. Eades was convicted at the conclusion of the trial. At no time during the course of the trial was there held a jury instruction and verdict conference (hereinafter "instruction and verdict conference). The absence of a jury instruction and verdict conference prevented Eades from receiving a fair trial.

13. After the trial, Harry Hertel (hereinafter "Hertel") replaced Kenyon as Eades' attorney in the criminal proceedings against her. Hertel requested a transcript for purposes of filing post-conviction motions at some time within three months following Eades' conviction.

14. After Hertel requested a transcript for purposes filing post-conviction motions, Sterlinske called his

court reporter Huff into his office and dictated a "certificate" in which he made certain representations as to what had occurred with respect to the instruction and verdict conference. (See Exhibit "A" attached hereto and incorporated herewith).

15. Upon information and belief, the above-described "certificate" materially misrepresented what actually occurred in the criminal proceedings. Sterlinske directed Huff to date the certificate as of the date of the trial, even though this was not the date on which it was prepared and signed. Moreover, Sterlinske directed Huff to indicate in the certificate that a full-fledged instruction and verdict conference had taken place in Sterlinske's chambers even though such a conference had not in fact occurred. Finally, Sterlinske caused Huff to alter the trial transcript so that it would be

consistent with its false certificate.

16. The certificate was stamped "Filed" with the Clerk's Stamp as of October 23, 1980, and the Court's docket sheet was changed to indicate that the certificate had been filed on that date, even though the document was filed on a much later date.

17. Upon information and belief, on some day after January 29, 1981, Sterlinske caused the aforementioned certificate to be stamped by Huff with the Clerk of Court's filing stamp, indicating that it had been placed in the court file on October 23, 1980, the original trial date, and placed in the court file.

18. Upon information and belief, on some day after January 29, 1981, Sterlinske caused Ewald to alter the docket sheet record to indicate that the afore-described certificate was filed on October 23, 1980, the original trial

date, even though the certificate was filed on a much later date.

19. Sterlinske, Huff, and Ewald all knew that the certificate was false. The participation of each in the stamping of the certificate and the insertion of it into the record was done with the intention of misleading others, including Eades and her counsel, regarding the proceedings at trial.

20. None of the defendants provided any of the parties to the criminal proceeding with notice of the insertion of the certificate in the record. Defendants did not provide said notice so as to mislead others, including Eades and her counsel, regarding the proceedings at trial.

21. After Hertel placed Sterlinske on notice that he intended to challenge the jury instructions, the jury verdict, and the instruction and verdict conference, Sterlinske further attempted

to persuade Hertel not to challenge the jury instructions, jury verdict, and the instruction verdict conference. Sterlinske, in a letter to Attorney Hertel of April 9, 1981, represented that "the file in the matter indicates that there was a conference held between all of the attorneys, the instructions were gone over carefully, and they were approved by both the district attorney and Mrs. Eades' counsel at that time." (See Exhibit "B" attached hereto and incorporated herewith. Said misrepresentation was fraudulent in nature and made with the intent to deceive the parties including counsel of record.

22. In his decision on post-conviction motions, Sterlinske, without reference to his certificate, falsely stated:

> Prior to the submission of the verdict and the charge to the jury, the clerk's minutes indicate that a conference was held in chambers, and the attorneys for the parties

> stipulated and agreed that the verdicts as submitted to the jury were approved by both and likewise there was no objection to any of the instructions as proposed by the Court. This was accomplished at 3:43 p.m. after the closing of the testimony of the parties.

The Clerk's minutes did not indicate any of what Sterlinske purported that they contained. Sterlinske denied Eades post-conviction motions.

23. Sterlinske sentenced Eades to two years in prison.

24. On or about April 30, 1981, Sterlinske communicated in writing to the Parole Board for the State Department of Health and Social Services (hereinafter "Board") regarding Marguerite Eades. One of the purposes of Sterlinske's letter (See Exhibit C attached hereto and incorporated herein) was to dissuade the board from granting Eades parole at her initial parole hearing. In his letter, Sterlinske stated:

> It has been my policy not to express any feelings one way or

> the other when I receive notices of the initial parole hearing. I would, however, be rather interested in being apprised of this inmate's present attitude as it relates to the circumstances surrounding these offenses. It is usually inconsistent to accept full responsibility and acknowledge improper conduct for which an inmate may be incarcerated on one hand, and then proceed with alternate remedies in seeking an appeal which at least seems to indicate an unwillingness to accept or recognize and acknowledge improper conduct. (Emphasis supplied).

In writing this letter, Sterlinske was also attempting to dissuade Eades from pursuing her appeal so that his criminal misconduct would not be discovered during her appeal.

25. Eades' request for parole was denied at her initial parole hearing. Eades served nine months in prison. Eades was in prison from December 16, 1980, to approximately September 6, 1981.

26. Upon information and belief, Sterlinske engaged in the actions described in paragraphs 21 and 22 so as

to mislead the parties and appellate courts as to what had occurred at the trial.

27. The acts of Sterlinske as described in paragraphs 14 through 22 and 24 above constitute illegal acts in violation of Wis. Stat. 946.72(1) (tampering with public records is a Class D felony), and Wis. Stat. 946.12 (misconduct in public office includes intentionally refusing to perform a nondiscretionary ministerial duty, does an act in excess of lawful authority or which he knows is forbidden by law, or in his official capacity as officer or employee, makes an entry in which a material respect is intentionally falsified) and also constitute non-judicial acts occurring outside Sterlinske's jurisdictional authority and absolute immunity as judge.

28. At times relevant hereto, defendants engaged in a pattern and

practice of fraudulently altering court records in legal cases other than the criminal proceedings regarding Eades as described above.

29. As a result of the fraudulent actions of defendants as described in paragraphs 14 through 22, 24 and 27-28, Eades did not obtain knowledge of said actions until a short time after February 11, 1985, when she received a letter from James E. Doyle, Jr. in his capacity as attorney for the Judicial Commission for the State of Wisconsin. (See Exhibit "D" attached hereto and incorporated herewith).

PLAINTIFF'S FIRST CAUSE OF ACTION

30. That as and for a cause of action against the defendants Sterlinske, Huff and Ewald, under 42 U.S.C., Sec. 1983, the plaintiff Eades hereby realleges all of the paragraphs previously set forth in this complaint as if set forth fully herein.

31. The acts of Sterlinske, Huff and Ewald, as described above, deprived Eades of liberty without due process of law, and denied her the equal protection of the laws, all in violation of her constitutional rights as secured by the Fourteenth Amendment of the United States Constitution.

32. That the actions engaged in by Sterlinske, Huff and Ewald, as described above, were committed under the color of state law and in violation of Eades' rights under the Fourteenth Amendment of the United States Constitution as described in paragraph 31.

33. That the actions engaged in by Sterlinske, Huff and Ewald, as described above, directly and proximately caused Eades to incur and suffer those damages as described in paragraph 45 below.

PLAINTIFF'S SECOND CAUSE OF ACTION

34. That as and for a second cause of action against defendants Sterlinske, Huff, and Ewald, under 42 U.S.C., Sec. 1983, the plaintiff Eades hereby realleges all of the paragraphs previously set forth in this complaint as if set forth fully herein.

35. The acts of Sterlinske, Huff and Ewald, as described above, deprived Eades of her right to a fair trial, a fair and impartial jury trial, effective assistance of counsel, a fair ~~and~~ impartial judge, and fair consideration of post-verdict motions and appeal based upon an accurate record, contrary to those due process guarantees as secured by the Sixth and Fourteeneth Amendments of the United States Constitution.

36. The actions engaged in by Sterlinske, Huff and Ewald, as described above, in violation of Eades' rights

under the Sixth and Fourteenth Amendments of the United States Constitution were committed under color of state law.

37. That the actions engaged in by Sterlinske, Huff and Ewald, as described above, directly and proximately caused eades to incur and suffer those damages as described in paragraph 45 below.

PLAINTIFF'S THIRD CAUSE OF ACTION

38. That as and for a cause of action for civil conspiracy against defendants Sterlinske, Huff and Ewald, the plaintiff Eades hereby realleges all of the paragraphs previously set forth in this complaint as if set forth fully herein.

39. That this cause of action for civil conspiracy is a state law claim brought pendent to plaintiff's federal causes of action as described above.

40. That the defendants Sterlinske, Huff, and Ewald, agreed to,

actually formed and operated a conspiracy to deprive Eades of her due process, liberty, fair trial and appellate rights by engaging in those wrongful and illegal acts as described in paragraphs 14 through 22, 24 and 27-28.

41. That each of the defendants Sterlinske, Huff and Ewald, acted and participated knowingly in the furtherance of their conspiracy as described in paragraphs 14 through 22, 24 and 27-28.

42. That each of the defendants Sterlinske, Huff, and Ewald, were aware of, acquisced, and assented to the illegal actions and scheme as described above in paragraphs 14 through 22, 24 and 27-28.

43. That the defendants Sterlinske, Huff, and Ewald had a unity of purpose of common design in understanding, or a meeting of the minds, as to those unlawful acts as described above in paragraphs 14 through 22, 24 and

27-28.

44. That the civil conspiracy of defendants Sterlinske, Huff, and Ewald, as described above in paragraphs 14 through 22, 24 and 27-28 and 40 through 43 caused damage to Eades as described in paragraph 45 below.

COMPENSATORY DAMAGES

45. As a direct and proximate result of the actions engaged in by defendants as described above, Eades has suffered damages in the form of loss of wages, mental and physical distress, pain and suffering, humiliation, loss of reputation and diminished earning capacity and will continue to suffer said damages in the future.

PUNITIVE DAMAGES

46. That the course of conduct of defendants as described above was deliberately undertaken and was committed in wanton, willful and reckless disregard of Eades' rights, and in view of the

aggravating circumstances set forth above, was attended by malice and vindictiveness on the part of defendants.

47. As a result of the course of conduct of defendants, Eades is entitled to punitive damages.

WHEREFORE, plaintiff Eades demands:

(a) Trial by jury on all claims for relief.

(b) Back wages including interest.

(c) Compensatory damages in the sum of $1,000,000.00.

(d) Punitive damages in the amount of $1,000,000.00.

(e) Reasonable attorneys' fees and costs and disbursements pursuant to 42 U.S.C., Sec. 1988.

(f) Grant such other and further relief as the Court deems just and proper.

Dated this 9th day of January, 1986.

Respectfully submitted,

Marguerite Eades, plaintiff

BY:

Fox, Fox, Schaefer &
Gingras, S.C.
Robert J. Gingras
44 E. Mifflin; Suite 403
Madison, WI 53703
Telephone: (608-258-9528

_____

Robert J. Gingras

BY:

Brynelson, Herrick,
Bucaida, Dorschel
& Armstrong
Steven J. Schooler
122 W. Washington Avenue
Madison, WI 53703

_____

Steven J. Schooler

April 15, 1986

Hand Delivered
Mr. Joseph W. Skupniewitz, Clerk
United States District Court
Western District of Wisconsin
120 N. Henry Street
Madison, WI 53701-0432

RE: Eades v. Sterlinske, et. al.
Case No. 85-C-824-S.

Dear Judge Shabaz:

Enclosed is Plaintiff's Brief in Opposition to Motion to Dismiss of Defendant Julie Ewald in reference to the above case. Copies of the brief have been mailed this same date to all opposing counsel.

This is also to advise the Court that the plaintiff and the defendant Ewald have agreed to a voluntary dismissal of Plaintiff's Third Cause of Action against defendant Ewald. Counsel will be providing you with the appropriate Stipulation and Order for Dismissal of

Plaintiff's Third Cause of Action against defendant Ewald.

Thank you for your consideration.

Very truly yours,

FOX, FOX, SCHAEFFER
& GINGRAS, S.C.

Robert J. Gingras

/smw
enclosure

cc: William Thiel
James McDermott
Steven J. Schooler